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Supreme Court, U.S.
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In The
Supreme Court of the United States

MOLA DEVELOPMENT CORPORATION,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

In *United States v. Winstar Corp.*, this Court found that the government was liable for its breaches of contracts for the treatment of regulatory goodwill which the government extended to healthy financial institutions and investors in exchange for their assumption of financial liabilities that threatened the government insurance fund. The Questions Presented are:

1. Can a *Winstar* contract exist where the terms are consistent with the Federal Home Loan Bank Board's regulatory policy at the time of contracting?

2. What are the requisites of a *Winstar* contract for supervisory goodwill?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, Mola Development Corporation, was the appellant below. Respondent, the United States of America, was the appellee below. The Federal Deposit Insurance Corporation was party to the proceeding in the Court of Federal Claims but was voluntarily dismissed from the case on July 8, 2003.

Mola Development Corporation has no parent corporation. No publicly held company owns 10 percent or more of the stock of Mola Development Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mola Development Corporation respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 516 F.3d 1370 (Fed. Cir. 2008), and is reprinted in the appendix hereto ("App.") at App. 1a. The order of the court of appeals denying rehearing and rehearing *en banc* is reprinted at App. 86a. The opinion of the Court of Federal Claims is reported at 74 Fed. Cl. 528 (2006) and is reprinted at App. 34a.

JURISDICTION

The court of appeals entered judgment on February 25, 2008, and entered an order denying rehearing and rehearing *en banc* on May 5, 2008. This Court has jurisdiction under 28 U.S.C. § 1254 (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Pub. L. 101-73, 106 Stat. 183 (1989)(codified in various sections of 12 U.S.C.) are set forth in the Appendix to this petition at App. 89a.

STATEMENT

1. This case arises from the thrift crisis of the 1980s. As previously chronicled by this Court, approximately 435 thrift institutions failed between 1981 and 1983. *United States v. Winstar Corp.*, 518 U.S. 839, 845 (1996). At the time, the Federal Savings & Loan Insurance Corporation ("FSLIC") lacked sufficient funds to liquidate all of the failing institutions and pay their depositors. The costs of liquidating the thrifts would have flooded the FSLIC's reserves by a factor of three. *Id.* at 847.

To alleviate this critical situation, the Federal Home Loan Bank Board ("FHLBB") solicited healthy financial institutions and investors to salvage insolvent thrifts through "supervisory mergers." *Winstar*, 518 U.S. at 847. These mergers were not intrinsically attractive to healthy institutions, and the FSLIC did not have sufficient cash to promote many of the acquisitions through direct subsidies. *Id.* at 848. Consequently, "the principal inducement for these supervisory mergers was an understanding that the acquisitions would be subject to a particular accounting treatment." *Id.* at 847. In most cases, the government agreed to permit the acquiring institution to offset the substantial net liabilities assumed in the mergers as "supervisory goodwill" which would be considered as an asset in meeting regulatory capital requirements. *Id.* at 849-50. The supervisory goodwill was to be amortized over an extended period of time in order to give the combined institution time to replace the goodwill with cash or other capital assets sufficient to meet traditional regulatory capital requirements. *Id.* at 849. The

"supervisory goodwill" was critical to these transactions "because, in most cases the institution resulting from the transaction would have been insolvent under federal standards if goodwill had not counted toward regulatory net worth." *Id.* at 850.

2. In 1984, Mola acquired a failing financial institution, named it Charter Savings Bank ("Charter") and turned that institution into a success within four years of the purchase. After successfully rehabilitating Charter, Mola began looking for a second savings and loan institution to acquire in 1987 and hired two former Federal Home Loan Bank Board of San Francisco ("FHLBSF") employees as consultants to assist with the project. C.A. App. A200372. Mola's consultants identified Merit Savings Bank ("Merit") as a possible acquisition partner. Merit was a minority-chartered financial institution which had experienced financial and operating difficulties since its inception in 1962 and operated under strict government supervision and operating restrictions. C.A. App. A200585-86. On December 15, 1987, the FHLBSF placed Merit on the FHLBB bidding schedule. At that time, Merit had regulatory capital of only $127,000 or .006 percent of its liabilities. C.A. App. A200371. The government's expected costs of liquidating Merit ran into the millions of dollars.

In late 1987, Mola approached the government to negotiate conditions for a merger between Charter and Merit. C.A. App. A200381. For Mola, any merger with Merit was dependent upon the government's agreement to designate the transaction as a supervisory merger; the designation

would allow Mola to account for the supervisory goodwill. Over the course of seven months, from approximately December 1987 through June 1988, Mola and the government engaged in extensive negotiations regarding the merger and the classification of the merger as "supervisory." C.A. App. A200003-04. While the supervisory designation was important for tax and accounting purposes, the corresponding extension of supervisory goodwill to the merged institution was the critical element during the months of negotiations between the parties. Without this promise of supervisory goodwill, Mola could not have acquired the failed institution because the merged institution would not have met the government's minimum capital requirements. C.A. App. A200383-84.

Mola contributed approximately $3.5 million to the merger, but the combined institution fell $10,564,345 *short* of the government's projected regulatory capital requirements. C.A. App. A200089, A200384. Mola could only agree to this seemingly detrimental transaction because the government agreed to extend supervisory goodwill to the institution in an amount that approximated the deficiency to be amortized over the course of 22 years. During the negotiation, the government confirmed Mola's need for supervisory goodwill and, in an FHLBSF memorandum, stated: "It is important to note that when the total amount of goodwill to be carried on the books of the resulting institution, $10,996,000, is subtracted, the capital of the resulting institution falls to $11,762,000, or 2.6 percent of liabilities. . . . Since Merit is a supervisory case, certain forbearances can be

approved." C.A. App. A200384, A200386. Mola acquired Merit in July 1988 and all parties counted supervisory goodwill toward the merged institution's capital requirements. C.A. App. A200416. Without this treatment, the merged institution would have been insolvent immediately upon the merger.

In 1989, without significant forewarning to the affected financial institutions, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Pub. L. 101-73, 106 Stat. 183 (codified in various sections of 12 U.S.C.), which eliminated the use of supervisory goodwill. Once deprived of supervisory goodwill, a substantial number of otherwise successful thrifts, including Charter, instantly became insolvent. The government seized Charter only 18 months after the merger. C.A. App. A200457. Charter simply had no way of replacing 22 years worth of amortized goodwill with other capital in 18 months. Had the government informed Mola of its plan to change the rules so drastically or its intent not to honor the amortization period while the parties were discussing the merger, Mola would not have gone through with the merger between Charter and Merit, and the government would have been facing far more substantial financial and political liabilities associated with the liquidation of Merit.

In *United States v. Winstar*, this Court held that FIRREA's change in capital requirements breached the government's contractual supervisory merger agreements by removing the central consideration for these agreements—supervisory goodwill. *Winstar*, 518 U.S. at 870.

3. Mola brought this action against the government in the Court of Federal Claims in December 1995 and alleged, among other things, that the government breached its contract for supervisory goodwill with Mola following the enactment of FIRREA. The Court of Federal Claims had jurisdiction over Mola's claims pursuant to 28 U.S.C. § 1491(a)(1) (2006). On December 14, 2006, the Court of Federal Claims entered summary judgment in favor of the government and against Mola on the issue of liability. Fundamentally, Judge Williams did not equate Mola's bargained-for supervisory designation with a promise of supervisory goodwill. Judge Williams instead focused on the fact that Mola's requests were inline with GAAP and regulatory policy, that Mola approached the government about the merger and that Mola would benefit from the larger economies of scale, and determined that these elements were inconsistent with the notion of a contract for supervisory goodwill. App. 76a-78a, 83a.

The Federal Circuit had jurisdiction over Mola's appeal from the Court of Federal Claims pursuant to 28 U.S.C. § 1295(a)(3) (2006), and it affirmed the trial court's decision in a 2:1 split decision. In affirming the lower court ruling with respect to Mola's breach of contract claim, the Federal Circuit found that Mola's bargained-for supervisory designation and its request to use the purchase method of accounting did not equate to a contract for supervisory goodwill. App. 15a-16a. The Federal Circuit looked at seven months of bargaining between the parties and declared the government's approval, supervisory designation and

conditioning of the merger to be a mere "regulatory" proclamation. App. 18a.

Judge Newman dissented from the Federal Circuit's finding that there was no contract in this case. App. 21a. In her dissent, Judge Newman explained:

> The arrangement whereby Mola agreed to contribute a total of $3.5 million in cash upon merger with the insolvent Merit Savings Association, and the government agreed to classify this merger as a supervisory case, was fully agreed, recorded, and implemented, in accordance with ordinary contract principles. The extensive written exchanges, along with the agency documentation, produced an integrated contract that is not distinguishable in its premises from the contract in [Winstar] . . . I respectfully dissent from my colleagues' affirmance of this decision, on this court's finding that no single document contains all of the contract conditions and the mistaken understanding of the government's approval of the merger as a supervisory case for accounting purposes.

App. 21a.

REASONS FOR GRANTING THE WRIT

I. The Federal Circuit has developed benchmarks and limitations pertaining to the question of contract formation in *Winstar* cases which conflict with this Court's opinion in *Winstar* and which run counter to traditional rules of contract law.

In *United States v. Winstar*, this Court found that the government contracted with various financial institutions for the treatment of regulatory goodwill during the thrift crisis of the 1980s and determined that the government should be held liable for its breaches of those contracts in the aftermath of the enactment of FIRREA. This Court considered three test cases in *Winstar* that involved claims that the government contracted with healthy financial institutions and investors for supervisory goodwill in exchange for their assumption of financial liabilities that threatened the government insurance fund. These test cases involved different levels of documentation and factual circumstances, but the Court looked at the totality of the circumstances surrounding the mergers and made it clear that the Bank Board letters, memoranda, resolutions, assistance agreements, and other regulatory documents papering the transactions were to be construed as part of a contractual commitment and not as mere statements of regulatory policy. *Winstar*, 518 U.S. at 863. The Court developed this standard, in part, because it would have been completely irrational for a healthy institution to take on a failing financial institution in

those cases without any promise of extended goodwill.

Since the original *Winstar* ruling, however, the Federal Circuit has seemingly endeavored to limit the government's liability for its breaches of these contracts for supervisory goodwill. To this end, the Federal Circuit has developed benchmarks and limitations with respect to the formation of a contract for supervisory goodwill that this Court did not mandate in *Winstar*. Specifically, the Federal Circuit and the Court of Federal Claims will not find a contract for supervisory goodwill where the terms of the agreement were within the scope of the government's regulatory policy regarding amortization periods and regulatory forbearances at the time of the agreement. These courts also seem to be looking for some magic language or documentation to evidence a contract for supervisory goodwill that was not present in the *Winstar* test cases.

The issue of contract formation was not squarely before this Court in *Winstar*, but the Court recognized the importance of the question and set forth some of its views on the subject in order to provide guidance in the hundreds of other *Winstar*-related cases. Twelve years after *Winstar*, the Federal Circuit is now making law regarding the requisites of a *Winstar* contract that conflicts with this Court's previously stated views, the Federal Circuit's and Court of Federal Claims' own prior law, and general contract principles. This issue affects numerous financial institutions, as well as potentially other parties who contract with the

government in other arenas. It is now appropriate for this Court to step in and define the parameters of a *Winstar* contract for the treatment of supervisory goodwill.

A. Can the terms of a contract for supervisory goodwill be consistent with the government's regulatory policy?

The Federal Circuit and the Court of Federal Claims found, in significant part, that Mola did not contract for the specific treatment of supervisory goodwill because Mola's requests regarding the use of purchase method accounting and the amortization of the resulting goodwill were consistent with then existing FHLBB policy and GAAP. As Judge Dyk noted, "the application provided for use of purchase method of accounting and amortization of any resulting goodwill over a period not to exceed twenty-five years, provisions which were consistent with Generally Accepted Accounting Principles ("GAAP") and standard FHLBB policy at the time." App. 4a. Judge Dyk further noted, "the merger application also included a list of six regulatory forbearances requested by Mola and Charter, none of which concerned the regulatory treatment of goodwill." *Id.* The Federal Circuit and the Court of Federal Claims believed that the use of purchase method accounting in Mola's case was consistent with the FHLBB's Memorandum SP-24 and GAAP and had no relationship to the designation of the merger as supervisory. App. 18a.

Judge Dyk, like Judge Williams in the Court of Federal Claims, assumed that Mola and the

government did not have a contract for supervisory goodwill because Mola's offers and requests were consistent with the FHLBB's regulatory policy at the time. Judge Dyk made a similar assumption in *First Federal Lincoln Bank v. United States*, 518 F.3d 1308 (Fed. Cir. 2008), an opinion he authored shortly after his opinion in Mola's case, where he found that a request for "standard treatment of goodwill, including use of the purchase method of accounting and amortization of goodwill over a twenty-five year period in compliance with GAAP" was inconsistent with a contract for supervisory goodwill. *Id.* at 1232-22. *First Federal* is distinguishable from Mola's case because First Federal's merger was not designated as being for supervisory purposes, but Judge Dyk's opinion in that case adds to the developing trend that the Federal Circuit will not find a contract where the bargained-for agreement was consistent FHLBB regulatory policy.

This Court did not establish that type of limitation on the development of a contract in *Winstar*. A bargained-for exchange should equate to a contract regardless of whether it is consistent with the government's regulatory policy or memorialized in agency documents. It is well established that the "FHLBB can memorialize a contractual commitment in agency documents." *Fifth Third Bank of Western Ohio v. United States*, 402 F.2d 1221, 1234 (Fed. Cir. 2005). This regulatory documentation is expected because regulatory agencies typically memorialize their actions in standard agency documents. *Id.* That is how the FHLBB did business.

Negotiations for the use of the purchase method of accounting, with corresponding supervisory goodwill, were the same regardless of the length of time a purchaser requested to amortize that goodwill. Indeed, the critical element was the negotiation, not the arbitrary figure that would be identified to amortize the supervisory goodwill created by those calculations. It is nonsensical for the court to find that the parties could have had a contract if the bargain involved 30 or 40 years of amortization for the merged institution's supervisory goodwill, but not if the amortization period was limited to 25 years or less consistent with FHLBB policy. There is no basis for the distinction, and Judge Dyk's decision unfairly punishes smaller financial institutions. Many factors contribute to the amount of time needed for amortization, and an institution's request to amortize supervisory goodwill over 22 years should be no less contract-worthy than a request to amortize goodwill over 30 to 40 years. The financial institutions that requested amortization over a period of 25 years or less, usually involving lower dollar value transactions, were just as, if not more dependent, on the government's grant of supervisory goodwill over the requested time period as larger institutions were dependent on the government's agreement to amortize supervisory goodwill over a longer period of time. In both cases, the contracting financial institutions would have been insolvent absent the government's agreement and were equally susceptible to destruction in the wake of FIRREA.

This Court previously discussed the concept of irrationality as it pertains to the question of contract

formation in the context of the *Winstar* mergers. Justice Souter explained that it would have been complete madness for a bank "to stake its very existence upon continuation of current policies without seeking to embody those policies in some sort of contractual commitment." *Winstar*, 518 U.S. at 863. Acquiring institutions knew that the regulators had a proven propensity to make changes to the rules when they were negotiating these mergers. They would not have reasonably relied on contemporary regulations as the government would suggest. *Winstar*, 518 U.S. at 863. This Court's "madness" concept plays a key role in this case.

The Court's analysis in *Winstar* supports the existence of a contract for supervisory goodwill in this case and in other cases where the contract terms were consistent with FHLBB policy. Mola could not have reasonably and rationally gone through with the merger without the government's promise of supervisory goodwill because the financial burdens associated with the merger would have been prohibitive. The merged institution would have been insolvent immediately upon the merger. Consequently, Mola's extensive contract negotiations for the supervisory designation were targeted specifically to achieve this promise of supervisory goodwill; FHLBB policy had no bearing on Mola's need to amortize the supervisory goodwill over a 22-year period. The fact that the newly-merged institution would have been out of compliance with regulatory capital standards from its inception, absent the inclusion of goodwill in the calculations, is strong evidence that the parties intended to be bound by the accounting treatment of goodwill

arising in the merger. *Winstar*, 518 U.S. at 866. For the government to now claim that it could not contract for something within the range of its regulatory policy defies the "madness" concept as explained by this Court.

In the case below, Judge Dyk rejected this Court's reasoning in *Winstar* and opined that the rationality or irrationality of a merger may say something about a bank's intent with respect to the merger but does not say anything at all about the government's intent. Judge Dyk's argument, which was based almost entirely upon an opinion in which he participated in *D & N Bank v. United States*, 331 F.3d 1374 (Fed. Cir. 2003), turns this Court's rationale on its head.[1]

In *Winstar*, Justice Souter explained,

> [T]he rationale for recognizing goodwill stands on its head in a supervisory

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[1] In *D & N Bank*, the Federal Circuit opined that the fact that a merger would be "irrational" or "mad" absent a contract for supervisory goodwill is insufficient to establish the existence of a contract where there is no other evidence that the parties intended to contract. *D & N Bank*, 331 F.3d at 1380. The court in that case found that, "[e]ven if D & N would have been instantly insolvent and out of regulatory compliance were it not allowed to treat goodwill as regulatory capital, that fact tells us nothing about the government's intent." *Id.* That case is very different from Mola's, however, because there was no evidence of any negotiations between the government and the financial institution in *D & N Bank*. Judge Dyk has now improperly extended the *D & N Bank* rationale to cases where there was a bargained for exchange for the supervisory designation and the treatment of regulatory goodwill.

> merger: ordinarily, goodwill is recognized as valuable because a rational purchaser would not pay more than the assets are worth; here, however, the purchase is rational only because of the accounting treatment for the shortfall . . . To those with the basic foresight to appreciate all this, then, it was not obvious that regulators would accept purchase accounting in determining compliance with regulatory criteria, and, it was clearly prudent to get agreement on the matter."

518 U.S. at 854-55. The government negotiated these merger agreements knowing that the acquiring thrifts expected the government to make good on its promises and that they could not survive if the government withdrew its consideration for the deals. This situation is comparable to an equitable contract where a party takes goods or services from the other party knowing that the other party reasonably expected to be paid for them. The government knew that Mola expected a 22-year period of amortization regardless of whether it was consistent with then existing FHLBB policy; the government cannot take the benefit of Mola's financial bailout of the FSLIC without making good on its own end of the bargain.

Additionally, while Judge Dyk commented that the facts of this case did not reflect the "government's intent" in entering into a contract, other *Winstar* cases evidence that intent. Specifically, when the government believed it was acting in a regulatory capacity, it sought to ensure

that the risk of regulatory changes fell on the purchaser. *See, e.g., Hometown Financial, Inc. v. United states*, 409 F.3d 1360 (Fed. Cir. 2005) (court found that there was a contract for supervisory goodwill over government's objection but determined that there was risk shifting language in the RCMDA that shifted risk of regulatory change to thrift after five years); *Admiral Financial Corp. v. United States*, 678 F.3d 1336 (Fed. Cir. 2004) (court found that there was a contract for supervisory goodwill over government's objection but determined that there was risk shifting language in the RCMDA that shifted risk of regulatory change to thrift); *First Annapolis Bancorp v. United States*, 75 Fed.Cl. 263 (2007) (government contested existence of contract but argued in the alternative that specific language in RCMDA shifted risk of regulatory change to thrift); *First Commerce Corp. v. United States*, 63 Fed. Cl. 627 (2005) (court found that there was a contract for supervisory goodwill over government's objection but determined that specific language of the RCMDA shifted risk of regulatory change to the thrift). In situations where the government intended to enter into a contract, the risk of regulatory change was irrelevant. The parties' contract eliminated that risk. Thus, where the FHLBB sought to address any regulatory burden, it is clear that the FHLBB believed it was operating in a regulatory capacity; where the FHLBB was silent on that issue, it is evidence that the FHLBB acquiesced in the belief that the parties had entered into an agreement which went beyond mere regulatory approval. While not conclusive, the FHLBB's choice not to include any risk shifting provisions in its agreement with

Mola tends to support the existence of a contractual relationship between the parties.

Finally, the courts have previously enforced contracts where the requested amortization periods did not exceed 25 years. Two of the *Winstar* test cases involved lengthy amortization periods, but the last case involved a contract for amortization over a period of not more than 25 years. *Winstar*, 518 U.S. at 867. The Court of Federal Claims also recognized that the government could contract for an amortization period up to 25 years. In *First Commerce Corp. v. United States*, the court found that the FHLBB's offer to allow the bank to amortize goodwill over a twenty-five year period became a contract when First Commerce accepted the government's offer contained in the forbearance letter by using the 25-year amortization period. 63 Fed. Cl. 627 (2005). Similarly, in *First Annapolis Bancorp, Inc. v. United States*, the trial court found that the parties' contract permitted supervisory goodwill to be amortized over 25 years because the Bank Board Resolutions and Forbearance Letters "contained express approval of the push-down method of accounting and the amortization of goodwill over a 25-year period." 75 Fed. Cl. 263, 276 (2007). Furthermore, regardless of whether the FHLBB granted extended periods of amortization, all of the subject amortization periods were consistent with GAAP. *See generally, Winstar*, 518 U.S. at 851 (explaining that financial institutions were allowed to amortize goodwill up to the 40 year maximum permitted by GAAP).

In this case, the bargained-for exchange between Mola and the FHLBB for the supervisory designation and other merger terms meets all of the requisites of a *Winstar* contract: "(1) mutuality of intent to contract; (2) consideration; (3) lack of ambiguity in offer and acceptance; and (4) a government representative having actual authority to bind the United States in contract." *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003). The number of years agreed upon for amortization or the fact that the government's promises were within the scope of the government's regulatory policy should have no bearing on the existence of the contract where the totality of the circumstances evidences an intent by both parties to contract for the treatment of supervisory goodwill.

B. Are there benchmarks or other requisites necessary for the formation of a contact for supervisory goodwill?

On appeal, Judge Dyk decided that approximately seven months of negotiations between Mola and the government regarding Mola's request for a supervisory designation and the capitalization of the resulting institution did not give rise to a contract between the parties. App. 3a. Judge Dyk distinguished Mola's case from other *Winstar*-related cases by declaring that Mola's contract negotiations pertaining to the supervisory designation for Merit and the use of purchase method accounting were not the same as contract negotiations for the regulatory treatment of goodwill. App. 15a-16a. As explained below, Judge Dyk erred in making that distinction. The two concepts are not separable. More to the

point, however, is the fact that the Judge Dyk appeared to be looking for some "magic language" or documentation to support the existence of a contract for supervisory goodwill in this case.

Beginning around January 1988, Mola and the government entered into a series of contract negotiations regarding the proposed merger. Mola's request that the FHLBB classify the merger as a supervisory acquisition was central to these negotiations. Mola's representatives were intimately familiar with supervisory mergers and FHLBB practices and specifically requested the supervisory designation during a January 28, 1988 meeting with representatives of the FHLBSF and then again in a February 1988 telephone conference with representatives of the FHLBB. C.A. App. A200003-04. In the February 1988 telephone call, the parties also specifically discussed the fact that Mola proposed to use supervisory goodwill and other non-cash contributions to meet minimum regulatory capital requirements. C.A. App. A200004. In both instances, the government informed Mola's representatives that it would consider the request. The FHLBB, however, also indicated that it had concerns about designating the transaction as supervisory because certain aspects of the transaction were not consistent with the FHLBB's traditional concept of a supervisory merger. C.A. App. A200004. The government feared that the latitude Mola was seeking with respect to capitalization and payment would set a precedent that it did not necessarily want.

Mola filed its H-(e)3 Application on April 20, 1988, with the knowledge that the government was still uncertain as to whether it would grant Mola the sought after supervisory designation. Consequently, Mola's application constituted an offer to the government and specifically included a request that the FHLBB classify the acquisition of Merit as a supervisory acquisition. C.A. App. A200022. Mola also requested in its application that the acquisition of Merit be accounted for as a purchase transaction and that, if the fair value of the liabilities assumed exceeded the fair value of the tangible and intangible assets acquired, that amount would be amortized to expense over twenty-two years. C.A. App. A200004, A200022. On initial review of Mola's application, the FHLBSF analyst noted that Mola included goodwill in the resulting institution's regulatory capital and that Mola's use of goodwill complied with FHLBB's policy guidelines.

Following Mola's submission of its H-(e)3 Application, the parties entered into another series of negotiations largely focused on Mola's request that the merger be classified as a supervisory acquisition and the resulting capitalization of the institution. Mola had compiled the H-(e)3 Application with the assistance of two former FHLBB employees who knew exactly what the rules were and what incentives were available. Consequently, Mola's application was far more streamlined than most and did not require extensive negotiation on other issues.

On May 18, 2008, in an FHLBSF memorandum, Supervisory Agent Anthony Paula

acknowledged the use of supervisory goodwill in Mola's acquisition of Merit:

> It is important to note that when the total amount of goodwill to be carried on the books of the resulting institution, $10,996,000, is subtracted, the capital of the resulting institution falls to $11,762,000, or 2.6 percent of liabilities. . . . Since Merit is a supervisory case, certain forbearances can be approved.

C.A. App. 200383-84. Clearly, the government knew that Mola intended to use supervisory goodwill to meet its capital requirements.

On May 20, 1988, however, Mola was still uncertain of the status of the designation and again requested that the FHLBB classify the acquisition as one being instituted for supervisory purposes and proposed five revisions to the cash contribution contingency in the H-(e)3 Application. C.A. App. A200404-05. The FHLBB rejected Mola's offer and proposed modifications on May 23, 1988. C.A. App. A200405. The next day, one of Mola's representatives counter-offered to the FHLBB that Mola would accept the government's conditions as previously outlined with the additional condition that the FHLBB designate that the acquisition was being instituted for supervisory purposes. C.A. App. A200405. It was not until June 1988, however, that the FHLBB Supervisory Director finally recommended that Merit be deemed a supervisory case. C.A. App. 200408. By that point, it was clear to

the government that Mola would not complete the transaction without the designation.

On June 21, 1988, FHLBB Supervisory Director Anthony Paula submitted a final memo noting: "The Bank Board has deemed Merit a Supervisory Case for the purposes of this acquisition . . . The regulatory capital of the resulting institution at the date of the acquisition of Merit will be approximately $10.9 million . . ." C.A. App. A200411. Contract negotiations continued on certain details of the acquisition until the transaction was consummated on July 29, 1988. At that time, the resulting institution's minimum regulatory capital requirement was approximately $14,000,000, and Mola's estimate of the supervisory goodwill resulting from the acquisition of Merit, as reflected in the Application, was $10,996,000. C.A. App. A200382-84.

Mola specifically requested that the government designate the transaction as a supervisory case no less than five times over a five month period, and the government affirmatively denied the request at least once before finally consenting to the classification. In addition, Mola requested two five-year forbearance periods related to the regulatory capital requirements and a two-year forbearance period pertaining to the inclusion of Merit's classified and scheduled assets in determining regulatory compliance. The FHLBB granted the two-year forbearance with respect to Merit's scheduled items while denying the other forbearances. Clearly, there was a bargained-for exchange between Mola and the government.

Despite the extensive negotiations regarding the supervisory designation and capitalization of the institution, however, Judge Dyk focused on the fact that there was no single integrated contract document or assistance agreement and the idea that Mola's requests were consistent with the FHLBB's regulatory policy at the time to arrive at the conclusion that the parties' agreement amounted to nothing more than mere regulatory approval. App. 6a, 16a. In arriving at this conclusion, Judge Dyk relied very heavily on language from another decision in which he participated, *D & N Bank v. United States*. In *D & N Bank*, the Federal Circuit rejected a contract claim where the government had labeled a merger "supervisory" upon application without any negotiation whatsoever with respect to the terms of the merger. *See D & N Bank v. United States*, 331 F.3d 1374 (Fed. Cir. 2003). Based on *D&N Bank*, Judge Dyk opined that Mola did not have a contract in the case below because the labeling of a merger as "supervisory" has no bearing on the government's intent to contract. App. 15a-16a. Mola's case is distinguishable from *D & N Bank* because *D & N Bank* did not involve the months of negotiation over the terms of merger, supervisory designation and accounting or the documentation found in the present case. Mola bargained for the designation and eventually overcame the government's resistance to the request; such bargained-for exchange was not present in *D & N Bank*.

In light of the above, one of the fundamental questions raised by Judge Dyk's ruling is whether there are key words or documents necessary to

establish a *Winstar* contract. In *Winstar*, this Court described a contractual agreement for the treatment of regulatory goodwill as follows:

> [T]he [FHLBB] resolutions, Forbearance Letters, and other documents setting forth the accounting treatment to be accorded supervisory goodwill generated by the transactions were not mere statements of then-current regulatory policy, but in each instance were terms in an allocation of risk of regulatory change that was essential to the contract between the parties.

Winstar, 518 U.S. at 909. Prior to Judge Dyk's ruling in the case below, there has never been a requirement that any specific document, such as an assistance agreement or supervisory action agreement, or particular language be present to establish the existence of a contract for supervisory goodwill. *See, e.g., California Federal Bank v. United States*, 39 Fed. Cl. 753, 773 (1997) (generally discussing framework). This is consistent with traditional contract law because "[c]ontracts are not technical documents requiring certain forms. Rather, they are legal relationships imposed by the law on parties when certain functional prerequisites like intent, offer, acceptance, and consideration occur in logical sequence." *California Fed. Bank*, 39 Fed. Cl. at 773.

In another case, the Federal Circuit correctly explained,

> If the factual records of the individual cases show intent to contract with the government for specified treatment of goodwill, and documents such as correspondence, memoranda and [FHLBB] resolutions confirm that intent, the absence of an [assistance agreement] or [supervisory action agreement] should be irrelevant to the finding that a contract existed.

Fifth Third Bank, 402 F.3d at 1229 (citing *California Federal Bank, FSB v. United States*, 245 F.3d 1342 (Fed. Cir. 2001))(alterations in original). Mutuality of intent to contract can be shown by several instruments as opposed to one document. *California Federal Bank*, 39 Fed. Cl. at 774. The substance of the contract can also be shown by testimony. *Fifth Third Bank*, 402 F.3d at 1234. The Federal Circuit should not have focused on the absence of a single encompassing contract document in arriving at its decision in Mola's case.

Historically, the Federal Circuit has typically sided with the financial institutions on the question of contract formation in the *Winstar*-related cases while limiting the government's financial exposure through restrictive damages decisions. Along these lines, the Federal Circuit previously commented:

> These cases reflect the relationships formed between the FHLBB and the thrifts as the FHLBB sought help from these institutions to solve the national savings and loan crisis. The cases are

> not identical, yet all arose in the same regulatory and economic environment, a backdrop against which these cases can be viewed. Despite different circumstances and variations in the documents containing the contract terms, in each of these cases we recognized there was a contractual agreement regarding the treatment of goodwill and its amortization period.

Fifth Third Bank, 402 F.3d at 1230. Further, "in light of the discussions between the Government and the acquiring thrift with regard to protections affecting capital requirements, including supervisory goodwill, the parties agreed that the acquiring thrift was to be given favorable accounting treatment of supervisory goodwill and its amortization." *Id.* at 1231. For this reason, there have only been a few cases where the Federal Circuit did not find the existence of a contract, e.g. *D&N Bank* where there was a "complete absence of evidence that the parties even contemplated an agreement regarding goodwill." *Fifth Third Bank*, 402 F.3d at 1230 (discussing *D & N Bank*). In *D&N Bank*, however, the relevant documents did not mention goodwill or the accounting treatment of goodwill, and the parties never had any discussions about goodwill. *Id.*

Additionally, Mola's negotiation for the use of the purchase method of accounting and the government's "supervisory" designation was effectively a negotiation for the use of supervisory goodwill. Judge Dyk incorrectly distinguished between these concepts when he opined that there

was no evidence of a bargain between the parties for supervisory goodwill. As this Court previously explained, the purchase method of accounting took on a regulatory significance in the context of a contractual supervisory merger that it did not necessarily have in other contexts. *Winstar*, 518 U.S. at 853-54. Here, the government's agreement to extend the supervisory designation and right to use the purchase method of accounting to the merged institution was principally, if not solely, effected to allow Mola to use the resulting supervisory goodwill to meet its capital requirements. While the specific language reflecting the agreement may not be a mirror image of language used in other *Winstar* agreements, the principal aspects of the agreements are the same.

In a supervisory merger, "the government provided substantial incentives, including accounting procedures that achieved paper compliance with capital requirements; these procedures were manifested in the 'purchase method' of accounting for liabilities that were designated as 'supervisory goodwill.'" App. 22a-23a. While GAAP accounting permitted the purchase method of accounting to be used in a variety of circumstances, the relevant regulations with respect to financial institutions "did not explicitly state that intangible goodwill assets created by that method could be counted toward regulatory goodwill." *Winstar*, 518 U.S. at 854. This Court previously opined that it would be erroneous to assume that the accounting goodwill that was generally available was the equivalent of a government grant of supervisory goodwill in an upside down bank merger. *Id.* at 854-

55. Further, even as late as 1988, the applicable regulations did not resolve this ambiguity as to whether goodwill could qualify as regulatory capital. *Winstar*, 518 U.S. at 855, fn. 9. In short, acquiring institutions understood that it was likely that they needed the government's permission to count "goodwill" in meeting their regulatory requirements over any period of time, and they reasonably expected to bargain for "supervisory goodwill" for use in meeting their regulatory requirements. *Id.* at 853-54.

Given the guidelines from this Court, Judge Newman explained in her dissenting opinion on appeal that the "classification as 'supervisory' achieves the regulatory treatment of goodwill." App. 24a. In the context of a supervisory merger, "the *purchase method of accounting implemented* recognition of supervisory goodwill and enabled the merged entity to meet capital requirements." App. 23a (emphasis added). FIRREA ended this system whereby financial institutions were able to use supervisory goodwill and long-term amortization to meet capital requirements. App. 24a.

This Court made its view on this concept clear when it explained that the purchase method of accounting and supervisory goodwill went hand in hand in mergers like the one found in this case. As this Court explained, "the principal inducement for these supervisory mergers was an understanding that the acquisitions would be subject to a particular accounting treatment that would help the acquiring institutions meet their reserve capital requirements imposed by federal regulations." *Winstar*, 518 U.S. at

848. "Goodwill recognized under the purchase method as the result of an FSLIC-sponsored supervisory merger was generally referred to as 'supervisory goodwill.'" *Id.* at 849. This "recognition of goodwill under the purchase method was essential to supervisory merger transactions of the type at issue in this case." *Winstar*, 518 U.S. at 849-50. Further:

> Under GAAP there are circumstances in which a business combination may be dealt with by the "purchase method" of accounting . . . The critical aspect of that method for our purposes is that it permits the acquiring entity to designate the excess of the purchase price over the fair market value of all identifiable assets acquired as an intangible asset called 'goodwill.' . . . Goodwill recognized under the purchase method as the result of a FSLIC-sponsored supervisory merger was generally referred to as "supervisory goodwill."

Winstar, 518 U.S. at 849. Goodwill in the context of a supervisory merger clearly offered something more than a mere accounting procedure.

The panel majority's argument on appeal that the purchase method of accounting was available to anyone is a red herring. Mola needed the government's supervisory classification for Merit so that it could count supervisory goodwill towards its minimum capital requirements over 22 years, and

that was the critical point in the parties' negotiations. Without the government's agreement to designate the merger as "supervisory," Mola may have been able to use the purchase method of accounting for some purposes, but it would have been an accounting tool that likely had no bearing on its regulatory capital requirements. Certainly, it would not have equated to a promise for supervisory goodwill to be applied to Mola's regulatory capital requirements over a 22 year period.

As Judge Newman explained, Mola's negotiations leading to Merit's designation as a supervisory case were specifically targeted to achieve the use of supervisory goodwill in meeting capital requirements. It was the supervisory goodwill and not the generally accepted accounting practice which Mola sought to achieve by insisting that the government designate the merger as a supervisory transaction. Mola's claim should not be denied based on a difference in semantics that is not distinguishable in practice.

Contrary to *Fifth Third Bank* and other precedent of the Federal Circuit, the Federal Circuit is now looking for some magic language or documentation to evidence contract formation where the totality of the circumstances and overall documentation was previously enough. This is a significant step in the wrong direction.

II. The question of contract formation in the *Winstar*-related cases merits review by this Court.

The Federal Circuit has plenary jurisdiction over federal contract litigation and has been charged with implementing the rules set forth in *Winstar*. Over the past 12 years, however, the Federal Circuit has increasingly chipped away at this Court's ruling in *Winstar* for the benefit of the government. Not every Federal Circuit decision departs from the *Winstar* mold, but there have been substantial departures from this Court's ruling in cases involving contract consideration, formation and remedies in recent years. As one observer noted in 2004, "[e]ight years after [the] high court said Uncle Sam was on the hook over [the] thrift crises, few plaintiffs have even seen a penny." *The S&L Payouts that Never Came*, Legal Times (Feb. 16, 2004).

Only this Court, not the Federal Circuit, has the prerogative to overrule one of its precedents. *State Oil Co. v.* Khan, 522 U.S. 3, 20 (1997). Yet, the Federal Circuit has slowly limited and strayed from *Winstar* to the point that the Federal Circuit is now ruling on these cases in a manner that disavows some of the *Winstar* principles as well as the Federal Circuit's own prior rulings and framework.

It is also appropriate for this Court to grant review in cases arising under the Federal Circuit's exclusive jurisdiction. *See, e.g., Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000); *Hercules, Inc. v. United States*, 516 U.S. 417 (1996); *Keene Corp. v. United*

States, 508 U.S. 200 (1993). Review is important in this case because no other circuit has the authority to decide the issues arising out of the *Winstar* cases, contribute to the formation of this body of law, or correct Federal Circuit's erroneous course. The *Winstar* decisions coming out of the Federal Circuit affect not only the remaining *Winstar* cases still pending in the Court of Federal Claims and at the appellate level, but have the potential to spill over into other government contract cases.

For the benefit of the remaining *Winstar* plaintiffs, and for all other parties who contract with the government, the Petitioner respectfully requests that this Court intervene and clarify and/or establish the requisites of a contract for supervisory goodwill and opine as to whether a goodwill contract can be consistent with the government's regulatory policy.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the Federal Circuit's judgment regarding the government's contract liability in this case.

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[ENTERED: FEBRUARY 25, 2008]

United States Court of Appeals for the Federal Circuit

2007-5058, -5080

MOLA DEVELOPMENT CORPORATION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Cross Appellant.

Paul R. Franke, III, Franke Greenhouse List & Lippitt LLP, of Denver, Colorado, argued for plaintiff-appellant.

Sameer P. Yerawadekar, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-cross appellant. With him on the brief were Michael F. Hertz, Deputy Assistant Attorney General, Jeanne E. Davidson, Director, and Kenneth M. Dintzer, Assistant Director.

Appealed from: United States Court of Federal Claims

Judge Mary Ellen Coster Williams

United States Court of Appeals for the Federal Circuit

2007-5058, -5080

MOLA DEVELOPMENT CORPORATION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Cross Appellant.

Appeal from the United States Court of Federal Claims in 95-CV-790, Judge Mary Ellen Coster Williams.

DECIDED: February 25, 2008

Before NEWMAN, Circuit Judge, CLEVENGER, Senior Circuit Judge, and DYK, Circuit Judges.

Opinion for the court filed by Circuit Judge DYK. Circuit Judge NEWMAN concurs in part and dissents in part.

Dyk, Circuit Judge.

This is a Winstar breach of contract case. See United States v. Winstar Corp., 518 U.S. 839 (1996). Appellant Mola Development Corporation ("Mola") owned a controlling interest in Charter Savings

Bank ("Charter"). Merit Savings Bank ("Merit") merged into Charter in 1988. After the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) ("FIRREA"), the merged institution was seized and liquidated for failure to comply with FIRREA's regulatory capital requirements. Mola urges on appeal that a contract existed between Mola and the government with respect to the treatment of regulatory goodwill and that there was a taking. The government's cross-appeal asserts a statute of limitations defense. Because we reject the government's limitations defense and conclude that there was no contract concerning the treatment of regulatory goodwill and no taking, we affirm the judgment of the Court of Federal Claims.

BACKGROUND

Mola entered the financial services business in 1984 by acquiring a controlling stake in a financially troubled savings and loan, Orange Coast Savings and Loan Association, which it renamed as Charter after the acquisition. After this successful merger, in 1987, Mola hired consultants to identify another troubled financial institution that could serve as a suitable merger partner for Charter. In 1986, the government expressed concern about the financial condition of Merit, and, on December 15, 1987, it proposed that Merit be placed on a bidding schedule for sale in June 1988. In November 1987, Mola's consultants selected Merit as the best merger partner for Charter, and in December 1987 Mola and Charter advised Merit's board of directors of Mola's interest in having Merit merge into Charter. Mola

notified the government of the proposed transaction the next day. Mola and Merit entered into a formal agreement regarding the terms of a merger between Merit and Charter on January 15, 1988.

Thereafter, in early 1988, representatives of Mola and the government discussed the terms for regulatory approval of the proposed merger, which required authorization by the Federal Home Loan Bank Board ("FHLBB"). At these meetings, Mola requested that the government classify the merger as supervisory and that it allow Mola to make a non-cash contribution, rather than contributing cash, to bring the merged entity into compliance with capital requirements. Neither request was granted at that time, and the government representatives indicated opposition to allowing Mola to fund the merged entity through a non-cash contribution.

Mola and Charter filed a formal application with the FHLBB seeking approval of the proposed merger between Charter and Merit on April 19, 1988. Among other provisions, the application provided for use of the purchase method of accounting and amortization of any resulting goodwill over a period not to exceed twenty-five years, provisions which were consistent with Generally Accepted Accounting Principles ("GAAP") and standard FHLBB policy at the time, and that required no regulatory forbearances. The merger application also included a list of six regulatory forbearances requested by Mola and Charter, none of which concerned the regulatory treatment of goodwill.

The government and Mola continued to disagree as to the level of cash contribution that would be required from Mola to complete the merger. On May 20, 1988, the government indicated that the merger would be approved only with a cash contribution sufficient to meet regulatory minimum capital levels. The government indicated that it would not accept any of Mola's six requested forbearances, and explicitly indicated that "Charter will maintain capital at minimum required levels without the non-cash contribution." J.A. at 200404. The government denied Mola's request for a new forbearance to exclude operating and capital losses and other liabilities assumed due to the acquisition of Merit from the calculation of the amount of cash required to bring the merged entity into regulatory compliance. Mola also requested that the merger be officially designated as supervisory, which as Mola indicated in a telephone call to the FHLBB on May 24, 1988, it was seeking in order to facilitate "use of net operating losses for tax purposes." Id. at 200404-05.

On June 24, 1988, the FHLBB, by letter, gave preliminary approval for the merger between Charter and Merit, and the merger closed on July 29, 1988, although no formal resolution was adopted by the FHLBB to approve the merger. The government classified the merger as supervisory, as Mola had requested. An internal FHLBB memorandum noted that "in order for Mola to utilize the benefits of a tax free reorganization and the net operating loss carryforwards of Merit, the Bank Board has deemed Merit a Supervisory Case for the purposes of this acquisition, in a certificate dated

June 24, 1988." Id. at 200411. The FHLBB's approval letter did not mention regulatory treatment of goodwill. The only regulatory forbearance mentioned in the approval letter stated that "[t]he calculation for the cash contribution shall exclude scheduled items of Merit as of September 30, 1987," id. at 200389, which allowed Mola to avoid counting certain of Merit's problem loans in calculating the cash contribution, allegedly for a two-year period. No document purports to be a written agreement between the FHLBB and either Mola or Charter. In particular, the government did not enter into any assistance agreement with Charter.

In the year after the merger, as a result of an FHLBB examination, Charter was designated as a "troubled institution" in a letter dated July 31, 1989. The FHLBB imposed restrictions on Charter's ability to increase its assets or liabilities. The letter also noted, in criticizing Charter's business plan, the probability that Charter would not be in compliance with stricter tangible capital requirements that would soon be imposed by legislation (that is, FIRREA).

FIRREA was enacted into law on August 9, 1989, and required the new Office of Thrift Supervision ("OTS") to promulgate implementing regulations within ninety days. OTS promulgated regulations that became effective on December 7, 1989. See Regulatory Capital, 54 Fed. Reg. 46,845 (Nov. 8, 1989). Charter was not in capital compliance under the new regulations when they became effective and, as a result, was seized by OTS on June 15, 1990, and subsequently liquidated.

Mola initiated this action in the Court of Federal Claims on December 5, 1995, urging that the implementation of FIRREA breached a contract between Mola and the government and that the government had also taken Mola's property when it retained a "surplus" resulting from the liquidation of Charter. The Court of Federal Claims denied a motion by the government to dismiss based on statute of limitation grounds, but granted summary judgment in favor of the government on the merits, finding that there was no contract relating to the treatment of goodwill and that there had been no taking. Mola Dev. Corp. v. United States, 74 Fed. Cl. 528, 541-42, 545-46 (2006). Mola appeals the judgment on the merits, and the government cross-appeals, challenging the denial of its motion to dismiss on statute of limitation grounds. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3), and review the decisions of the Court of Federal Claims on the motion to dismiss and summary judgment motion without deference. Guardian Indus. Corp. v. United States, 477 F.3d 1368, 1370 (Fed. Cir. 2007).

DISCUSSION

I

Claims against the government under the Tucker Act are subject to a six-year statute of limitations.[1] 28 U.S.C. § 2501. The government argues that the statute of limitations began to run when FIRREA was enacted, on August 9, 1989, and

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[1] The Supreme recently held that this limitations period is jurisdictional. John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750 (2008).

that the claims here were untimely because they were filed more than six years later, on December 5, 1995. This position was rejected in our recent decision in Bank of America, FSB v. Doumani, 495 F.3d 1366 (Fed. Cir. 2007). There we approved the reasoning of the Court of Federal Claims in Bank of America, FSB v. United States, 51 Fed. Cl. 500, 506 (2002), that the mere passage of FIRREA on August 9, 1989, did not trigger the limitations period for Winstar claims. Bank of Am., 495 F.3d at 1372.[2] We are bound by this holding in Bank of America, and we therefore reject the government's argument. Mola's cause of action did not accrue on the date of the passage of FIRREA.

Alternatively, the government urges that the Court of Federal Claims erred in holding that the limitations period did not begin to run until after FIRREA's implementing regulations became effective, on December 7, 1989.[3] The government urges that the statute of limitations can begin to run before FIRREA's implementing regulations were adopted, and that the statute of limitations in this case did begin to run before the regulations were adopted.

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[2] See also id. at 1375 (Mayer, J.. dissenting) (dissenting based on the view that "the August 9, 1989, enactment of [FIRREA] caused Bank of America[]'s claim to accrue").

[3] This court has held that claims filed more than six years after the December 7, 1989, effective date of FIRREA's implementing regulations are untimely. See Shane v. United States, 161 F.3d 723, 724 (Fed. Cir. 1998); Ariadne Fin. Servs. Pty. Ltd. v. United States, 133 F.3d 874, 880 (Fed. Cir. 1998). Mola's claim was filed less than six years after this date.

The government is correct that the statute of limitations can begin to run before the adoption of FIRREA's implementing regulations. The Bank of America court, approving the Court of Federal Claims' reasoning, clarified that "activity before FIRREA's effective date can indeed start the clock" as to the limitations period. Bank of Am., 495 F.3d at 1372. However, it also approved the Court of Federal Claims' reasoning in that case, 51 Fed. Cl. at 506-09, that some of the government's actions in that case did not trigger the running of the limitations period. There the government had argued that the triggering actions were an August 31, 1989, regulatory bulletin requiring all thrifts to plan for the implementation of FIRREA and a letter, also dated August 31, 1989, indicating the government's intent to delay approval of a merger based on FIRREA. We held that these actions were insufficient to initiate the limitations period because they "did not contain a requirement for [the thrift] to take specific action contrary to its existing contract." Bank of Am., 495 F.3d at 1372. The Bank of America court also approved the Court of Federal Claims' reasoning that a subsequent October 6, 1989, letter that approved the delayed merger on the condition of full compliance with FIRREA's capital requirements, 51 Fed. Cl. at 510, did initiate the limitations period as to Bank of America's claim because the condition of compliance with FIRREA was necessarily inconsistent with the alleged contract. Bank of Am., 495 F.3d at 1372 ("[T]he earliest letter sufficient to cause a breach carried the date of 6 October 1989."). That letter, however, was sent within the six-year limitations period.

The government here asserts that its July 31, 1989, letter, which designated Charter as a troubled institution and imposed immediate restrictions on Charter, initiated the limitations period for Mola's claim. The Court of Federal Claims rejected this argument, finding:

> To the extent the July 31 letter imposed an immediate harm on Charter, such harm was not due to an accelerated application of FIRREA . . . . Rather, the harm resulting from the July 31 letter – limitations on growth and restrictions on increases in assets or liabilities – stemmed from Charter's poor operating performance reflected in the April Report of Examination. These limitations did not purport to be an acceleration of FIRREA . . . .

Mola Dev. Corp., 74 Fed. Cl. at 541. This finding was not clearly erroneous. Thus, although the July 31 letter imposed immediate restrictions on Charter, these restrictions related to ongoing concerns about Charter's management, operating margins, level of tangible capital, and business plan and were not based on the impending enactment of FIRREA.

Because we agree with the Court of Federal Claims' finding that the July 31, 1989, letter did not trigger the running of the statute of limitations, we fail to see how Charter's September 14, 1989, response to the government's letter, suggesting that the government's position was inconsistent with the terms negotiated at the time of the merger, could be

sufficient to trigger the initiation of the limitations period. While it is clear that Charter was concerned that as a result of FIRREA the government would not continue to allow goodwill as an aspect of regulatory capital, the government had not yet taken any action in this regard. Moreover, Charter reiterated in its September 14, 1989, letter that, in the absence of implementing regulations, it was not yet required to comply with the new FIRREA capital requirements. Although Charter's September 14 letter suggested that the action taken in the government's July 31 letter resulted from a premature application of FIRREA, Charter's erroneous assertion that this was the basis for the government's action does not change the fact that the government's action was not based on FIRREA. Rather, as the Court of Federal Claims found, Charter's attempt in the September 14 letter, "to shift the blame for the problems identified in the April Examination from its own previous operating difficulties to future requirements emanating from FIRREA" did nothing to alter the fact that the government had not yet implemented FIRREA's restrictions on regulatory use of supervisory goodwill, either generally or with respect to Charter. Id. at 541.

Under these circumstances, the statute of limitations was not triggered until the FIRREA implementing regulations became effective on December 7, 1989. Since this action was filed less than six years later, the statute of limitations does not bar the claim.

II

Mola urges that the Court of Federal Claims erroneously granted summary judgment as to its takings claim. "In analyzing a takings claim, a court must first determine what was taken." Branch v. United States, 69 F.3d 1571, 1575 (Fed. Cir. 1995). Mola does not argue, as have previous Winstar plaintiffs, that the government took a contractual right to particular regulatory treatment of goodwill. [Bl.Br. 27] Indeed, this theory has been soundly rejected. See Castle v. United States, 301 F.3d 1328, 1342 (Fed. Cir. 2002) (establishing a broad rule that the breach of any contractual rights regarding regulatory treatment of goodwill does "not constitute a taking of the contract" so long as "the plaintiff[] retain[s] the full range of remedies associated with any contractual property right [it] possessed"); accord Bailey v. United States, 341 F.3d 1342, 1347 (Fed. Cir. 2003). We have also established that the seizure of an insolvent bank for liquidation does not constitute a taking. See Bailey, 341 F.3d at 1347 ("[I]t is well established that it is not a taking for the government to close an insolvent bank and appoint a receiver." (quoting Branch, 69 F.3d at 1575)).

Mola appears to argue that even if Charter was insolvent at the time it was seized by government regulators, there ultimately was a "$6,232,301.00 surplus net income from the liquidation of Charter," that this alleged surplus belonged to Mola, and that it was taken by the government. Appellant's Br. at 27. We have recognized that if a surplus were to exist after the liquidation of a seized institution and the

satisfaction of all of the institution's liabilities, the institution's prior owners would have a property interest in such a surplus. See Bailey, 341 F.3d at 1347. Mola, however, has identified no evidence of a surplus of Charter's assets over its liabilities. The $6,232,301 figure Mola cites appears on a profit and loss statement, and indicates income during the liquidation in that amount. However, the receiver's statement of assets and liabilities states that at the time of its seizure Charter's liabilities exceeded its assets by more than sixteen million dollars. Mola has failed to establish any surplus that was taken by the government.[4]

III

Mola also challenges the entry of summary judgment in favor of the government as to its breach of contract claim, arguing that there was a contract relating to regulatory treatment of goodwill, which was breached by the implementation of FIRREA. "In order to prevail in a Winstar case a plaintiff . . . must establish that a contract existed with the government whereby the government was 'contractually bound to recognize the supervisory

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[4] As Mola notes, the Federal Deposit Insurance Corporation ("FDIC") withdrew from the litigation because it concluded that it had little prospect of recovery on behalf of Charter's creditors. See, e.g., Landmark Land Co. v. FDIC, 256 F.3d 1365, 1382 (Fed. Cir. 2001) ("[W]here the FDIC has not asserted claims for recovery in excess of what the failed thrift owes to the government, the case-or-controversy requirement is not satisfied."). The FDIC's decision to voluntarily dismiss its claims does not amount to a concession that any excess recovery belongs to Mola, rather than the government, as Mola asserts.

goodwill and [particular] amortization periods.'" Franklin Fed. Sav. Bank v. United States, 431 F.3d 1360, 1365 (Fed. Cir. 2005) (quoting Winstar Corp. v. United States, 64 F.3d 1531, 1541-42 (Fed. Cir. 1995), aff'd, 518 U.S. 839 (1996)). To prove the existence of a Winstar contract, like any other contract with the government, "four basic requirements must be met: (1) mutuality of intent to contract; (2) lack of ambiguity in offer and acceptance; (3) consideration; and (4) a government representative having actual authority to bind the United States in contract." Anderson v. United States, 344 F.3d 1343, 1353 (Fed. Cir. 2003).

This court has previously explained the type of evidence needed to prove the government's intent to enter into a Winstar contract. We have emphasized that "regulatory proclamations are insufficient to create contractual obligations because . . . '[m]ere approval of the merger does not amount to [an] intent to contract.'" Id. at 1357 (quoting D & N Bank v. United States, 331 F.3d 1374, 1378 (Fed. Cir. 2003)). "An agency's performance of its regulatory or sovereign functions does not create contractual obligations." D & N Bank, 331 F.3d at 1378-79; see also Cain v. United States, 350 F.3d 1309, 1315-16 (Fed. Cir. 2003). Rather, "there must . . . be a clear indication of intent to contract and the other requirements for concluding that a contract was formed." D & N Bank, 331 F.3d at 1378. A plaintiff must provide "something more than a cloud of evidence that could be consistent with a contract to prove a contract and enforceable contract rights." Id. at 1377. In other words, "something more" than

mere regulatory approval of the merger must be shown. See id. at 1379-80.

At the same time, we have recognized that a formal written agreement is not necessary to prove the existence of a Winstar contract when there is other adequate evidence of the government's intent to form a contract. See Fifth Third Bank of W. Ohio v. United States, 402 F.3d 1221, 1231-32 (Fed. Cir. 2005). In Fifth Third, we held that, even in the absence of any formal document purporting to be an agreement between the institution and the government, the documentary evidence, including a merger application, an FHLBB resolution, and a letter recommending conditional approval of the merger, constituted an agreement as to the treatment of goodwill because an explicit agreement for the treatment of goodwill had been negotiated with respect to each of four consecutive mergers. Id.

Mola here points to no evidence of any negotiations about the regulatory treatment of goodwill that could serve as evidence that the government agreed to a goodwill contract.[5] Instead, Mola argues that its negotiation for the FHLBB's designation of the merger as "supervisory" is sufficient evidence of the government's intent to form a contract with respect to regulatory treatment of goodwill. This court rejected a similar argument in D & N Bank, explaining that "labeling a merger

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[5] The dissent, Diss. Op. at 7, urges that there were such negotiations, but this is entirely premised on the existence of negotiations over the supervisory designation which, as we discuss, did not concern use of the purchase method or goodwill.

'supervisory,' alone, . . . tell[s] us nothing about the government's intent to contract." 331 F.3d at 1380. Mola nonetheless asserts that the negotiation over the supervisory designation was in effect a negotiation over the treatment of goodwill because such a designation was necessary, under the prevailing regulations, to allow use of the purchase method of accounting, the only accounting method that would recognize goodwill as an asset for regulatory purposes. We disagree with Mola's construction of the regulations, and thus need not decide the question of whether Mola could prevail under a contrary construction.[6]

The regulations themselves do not address the purchase method of accounting, though the regulations do set forth the standards for regulatory compliance. Section 563.13(b)(7)(i) provided that, "after any merger, consolidation, or purchase of assets and assumption of liabilities . . . the regulatory capital requirement of the continuing institution is computed . . . based on the combined

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[6] Mola's present argument in this regard rests on the affidavit of Munjit Johal, a former official of at the Federal Home Loan Bank of San Francisco and a consultant to Mola at the time of the merger. This affidavit suggests that a supervisory designation was required, pursuant to 12 C.F.R. § 563.13(7)(I)&(III) (1988), to use the purchase method of accounting in a merger to create goodwill as a book asset. Because the proper interpretation of these regulations is an issue of law, expert testimony relating to this question, such as the affidavit of a former government official, "should not be received, much less considered." Rumsfeld v. United Techs. Corp., 315 F.3d 1361, 1369 (Fed. Cir. 2003). We therefore afford no weight to this affidavit in construing the regulations. Instead, we look to the regulations themselves and related documents to interpret the regulatory requirements.

assets, investments, base liabilities, and increased liabilities of the merged and continuing institutions." 12 C.F.R. § 563.13(b)(7)(i) (1988) (emphasis added).

The purchase method of accounting is addressed in detail in the FHLBB's internal Memorandum SP-24 (December 29, 1981). That memorandum provides for two different methods of accounting when a merger or purchase of assets occurs: the pooling method, which aggregates the assets and liabilities of the merging entities, and the purchase method, which calculates combined assets as if the dominant entity purchased the acquired entity by assuming its liabilities. Mola is correct that of the two available methods of accounting, only the purchase method, and not the pooling of assets method, allowed goodwill to be recognized as an asset of the merged entity.

Memorandum SP-24 provides that regulators would consider the economic reality of the combination in order to determine which accounting method to allow, and the purchase method of accounting was allowed, among other situations, when "[o]ne association with financial strength or significant size acquires or bails out small or weaker associations." J.A. at 200788. Nothing in Memorandum SP-24 suggests that whether the merger has been designated as supervisory is even relevant, let alone determinative, of the availability of the purchase method of accounting.

Mola correctly points out that 12 C.F.R. § 563.13(b)(7)(iii) provided that "the provisions of this paragraph (b)(7) of this section may be superseded"

by FHLBB, if it determined that a "consolidation, merger, or purchase of assets and assumption of liabilities . . . is instituted for supervisory purposes." In other words, the regulation allowed the FHLBB to grant regulatory forbearances, as to the requirements of section 563(b)(7)(i) discussed above, in the case of supervisory mergers and to suspend otherwise-applicable regulatory capital requirements. There is no showing in this case that any forbearances provided for the treatment of goodwill.[7]

Thus, the regulations and memorandum do not support Mola's assertion that the supervisory designation was necessary to utilize the purchase method of accounting. The use of the purchase method of accounting in this case was consistent with Memorandum SP-24 and GAAP and did not require forbearances or the designation of the merger as supervisory.[8]

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[7] The FHLBB's practice of granting forbearances as to mergers designated as supervisory was routinized to some extent by Memorandum SP-37a, which "established three categories of potential forbearances: (i) standard forbearances that will be granted; (ii) forbearances that may be granted on a case-by-case basis if circumstances so justify; and (iii) forbearances that will not be granted." Mola Dev. Corp., 74 Fed. Cl. at 544. The Court of Federal Claims found that Mola and Charter had not requested any forbearance relating to regulatory treatment of goodwill under Memorandum SP-37a.

[8] FIRREA used the new term "supervisory goodwill" to mean "goodwill resulting from the . . . combination of any savings association where the market value of the assets acquired was less than the market value of the liabilities at the time of the transaction and where the accounting treatment of the goodwill has been approved by the [FHLBB]." H.R. Rep. No. 101-54(I), at 432 (1989), reprinted in 1989 U.S.C.C.A.N. 86,

Mola also argues that the government must have intended to form a contract with respect to regulatory treatment of goodwill because Charter would not have had sufficient capital to meet regulatory requirements absent the inclusion of goodwill in its regulatory capital calculation. This court has already rejected this argument in D & N Bank. While imminent regulatory noncompliance may help to establish that negotiated forbearances were contractual, see Fifth Third, 402 F.3d at 1232-33, the mere risk of regulatory noncompliance absent use of the purchase method of accounting does nothing to establish the existence of a goodwill contract, D & N Bank, 331 F.3d at 1380. In the absence of other evidence indicating the government's intent to contract, the mere fact that the government approved a merger that, without inclusion of goodwill in Charter's regulatory capital calculation, would have left Charter's capital level below the regulatory minimum does not establish any contract to maintain this treatment of goodwill. See id. at 1380 ("Even if D & N would have been instantly insolvent and out of regulatory compliance were it not allowed to treat goodwill as regulatory capital, that fact tells us nothing about the government's intent.").[9]

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228. The use of this definition in FIRREA does not suggest that prior to FIRREA the supervisory designation was required for a thrift to recognize goodwill under the purchase method of accounting.

[9] We need not reach the government's contention that Mola lacks standing to assert a Winstar breach of contract claim because Mola was not a party to any agreement with the government regarding regulatory treatment of goodwill, even if Charter was a party to such a contract.

Finally, Mola argues that it was granted a two-year forbearance with respect to the regulatory treatment of certain of Merit's problem loans, that this forbearance was contractual, and that the government breached this contract. As the government points out, whether or not there was such an agreement with respect to any forbearances regarding certain of Merit's problem loans, Mola has failed to demonstrate that such a breach of contract claim was presented before the Court of Federal Claims in this case, and it is too late to assert it on appeal.

CONCLUSION

We affirm the Court of Federal Claims' denial of the government's motion to dismiss because the statute of limitations did not bar Mola's action. We also affirm the entry of summary judgment in favor of the government as to Mola's takings and breach of contract claims.

AFFIRMED

[ENTERED: FEBRUARY 25, 2008]

United States Court of Appeals for the Federal Circuit

2007-5058, -5080

MOLA DEVELOPMENT CORPORATION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Cross Appellant.

Appeal from the United States Court of Federal Claims in 95-CV-790, Judge Mary Ellen Coster Williams.

NEWMAN, Circuit Judge, concurring in part and dissenting in part.

I concur in the court's holding that the complaint of Mola Development Company was filed within the six-year limitations period of the Tucker Act. However, the court errs in ruling that there was no contract between Mola and the federal bank authorities. The arrangement whereby Mola agreed to contribute a total of $3.5 million in cash upon merger with the insolvent Merit Savings Association, and the government agreed to classify this merger as a supervisory case, was fully agreed, recorded, and implemented, in accordance with ordinary contract principles. The extensive written

exchanges, along with the agency documentation, produced an integrated contract that is not distinguishable in its premises from the contract in United States v. Winstar Corp., 518 U.S. 839 (1996). The circumstances and documents left no doubt that a contract including supervisory goodwill was intended and formed, to implement government's program created with the sole purpose of encouraging healthy thrifts to acquire insolvent ones in order to reduce the government's liability to the failing banking industry. The Court of Federal Claims erred in its holding that there was no contract and no liability. I respectfully dissent from my colleagues' affirmance of this decision, on this court's finding that no single document contains all of the contract conditions and the mistaken understanding of the government's approval of the merger as a supervisory case for accounting purposes.

DISCUSSION

As discussed in Winstar, between 1981 and 1983 approximately 435 thrift institutions had failed and the Federal Savings and Loan Insurance Corporation (FSLIC) was exhausting its insurance fund. In this critical situation, the Federal Home Loan Bank Board (FHLBB) encouraged solvent banks and thrift institutions to salvage insolvent thrifts. As the Court explained in Winstar, the government's liability was substantially reduced when insolvent thrifts were enabled to remain in operation, as compared with the cost of federal liquidation. 518 U.S. at 847-48. Thus the government provided substantial incentives,

including accounting procedures that achieved paper compliance with capital requirements; these procedures were manifested in the "purchase method" of accounting for liabilities that were designated as "supervisory goodwill," accompanied by long-term amortization and various other concessions and forbearances. The Court remarked particularly on the accounting treatment of supervisory mergers, for

> [T]he principal inducement for these supervisory mergers was an understanding that the acquisitions would be subject to a particular accounting treatment that would help the acquiring institutions meet their reserve capital requirements imposed by federal regulations.

518 U.S. at 848. The Court explained that the purchase method of accounting implemented recognition of supervisory goodwill and enabled the merged entity to meet capital requirements:

> Under GAAP there are circumstances in which a business combination may be dealt with by the "purchase method" of accounting. . . . The critical aspect of that method for our purposes is that it permits the acquiring entity to designate the excess of the purchase price over the fair value of all identifiable assets acquired as an intangible asset called "goodwill." . . . Goodwill recognized under the purchase

> method as the result of a FSLIC-sponsored supervisory merger was generally referred to as "supervisory goodwill."

Id. at 849.

FIRREA ended this system, and prohibited the use of supervisory goodwill and long-term amortization to meet capital requirements. Many of the acquired thrifts fell out of compliance, and were seized and liquidated by the government; in Winstar the Court ruled that the enactment and implementation of FIRREA breached the government's contractual obligations incurred in authorizing such acquisitions.

Such a breach occurred here. The contract between Mola and the federal government was an integrated combination of various documents involving the government, Mola and its subsidiary Charter, and the insolvent Merit Savings Association. Mola agreed to contribute approximately $2.5 million in cash to the merged Charter/Merit thrift institution, plus an additional $1 million to Merit's shareholders, and the government agreed to classify the merger as "supervisory." Although the panel majority states that "the FHLBB's approval letter did not mention regulatory treatment of goodwill," maj. op. at 4, the majority's conclusion is inaccurate, for the classification as "supervisory" achieves the regulatory treatment of goodwill. As the record shows, this treatment was essential to Mola's agreement to acquire the insolvent Merit thrift

institution, and essential to the merged institution's compliance with capital requirements.

The contractual arrangement between Mola and the government involved various documents, including Mola's H-(e)3 application, filed on April 19, 1988. The H-(e)3 application included a "Consolidated Charter & Merit Balance Sheet" that listed supervisory goodwill as an asset valued at $10,996,000 as of December 30, 1987. In paragraph (g) of the H-(e)3 application, entitled "Accounting Procedures," Mola stated the condition "to record the acquisition of Merit as a purchase transaction under generally accepted accounting principles . . . and Statement of Financial Accounting Standards No. 72 ('FASB No. 72')." The record shows FASB No. 72 as the Financial Accounting Standards Board standard 72 for "the amortization period of goodwill." Paragraph (g) also states that "identifiable intangible assets acquired" include "FASB No. 72 goodwill." The H-(e)3 application compiled the information that the record showed to be under discussion as the offer from Mola to merge the insolvent Merit into Mola's solvent subsidiary Charter, through a supervisory acquisition. Mola's H-(e)3 application included the purchase method of accounting based on supervisory goodwill and long-term amortization.

The progress of the negotiations was recorded in various government documents, as in Winstar. A FHLB San Francisco (FHLBSF) memorandum dated May 18, 1988, by Supervisory Agent Mr. Paula, records the "goodwill to be carried on the books" of the merged Charter/Merit institution:

> It is important to note that when the total amount of goodwill to be carried on the books of the resulting institution, $10,996,000, is subtracted [from $22,758,000], the capital of the resulting institution falls to $11,762,000 or 2.6 percent of liabilities.

FHLBSF Memo. at 3. A letter dated June 7, 1988 to the FHLBSF Office of General Counsel specifically addressed the question: "Should the Federal Home Loan Bank Board issue a certificate deeming Merit Savings Bank a supervisory case for the purposes of the subject application?" The FHLBSF letter stated that "the applicant has requested that Merit be deemed a supervisory case by the Bank Board and that the subject acquisition be considered as being instituted for supervisory purposes." The FHLBSF letter recommended that "the Secretariat of the Bank Board deem Merit a supervisory case." Letter at 3. The FHLBSF letter also stated that Mola's request for forbearance from the minimum capital requirement would not be approved except for Merit's "Scheduled Items." Id. There followed the FHLB's letter to Mola dated June 24, 1998, stating that Mola's H-(e)3 application was approved subject to these "Scheduled Items."

Approximately a month after the government's approval of the H-(e)3 application, a FHLBSF memorandum dated July 26, 1988, entitled "Charter Savings Bank . . . Negotiations for Application H-(e)3 for the Acquisition of Merit Savings Bank," summarized the circumstances leading to the approval of the merger. This

memorandum reported discussions of the merger terms in at least six meetings over the period from May 5, 1988 to May 24, 1988. The memorandum stated that on May 19, 1988 the FHLBB presented six conditions that it required, and that Mola responded on May 20, 1988 during a conference call by modifying the second condition, adding a seventh condition, and accepting the other conditions. The seventh condition was: "The acquisition is being instituted for supervisory purposes." Mola's proposed modification of the second condition was rejected by the FHLBSF on May 23, 1988, and on May 24, 1988 Mola acquiesced in the rejection and accepted condition two in its original form, but insisted on condition seven.

The Bank Board agreed to condition seven, and the FHLBSF memorandum of July 26, 1988 states that on May 24, 1998 the parties reached agreement and that "[t]he Bank Board will provide the necessary certification indicating that this acquisition falls within the requirements of a supervisory case." Mola testified during trial that "[o]n June 24, 1998, [Mola] got the approval letter from the Federal Home Loan Board, and on that same date, the Federal Home Loan Bank Board issued a certificate deeming Merit a supervisory case." The testimony was undisputed.

The merger of Charter and Merit closed on July 29, 1988, with the supervisory goodwill of the merged institution valued at $15,741,000 on the date of the merger. Both Mola and the government included goodwill in the accounting of Charter's regulatory capital, until December 7, 1989, the

effective date of FIRREA. Thereafter the merged institution was prohibited from utilizing the purchase method of accounting, and without the goodwill asset the institution was immediately out of capital compliance. Charter was seized and liquidated.

The government's liability for breach of contract on these premises was established by Winstar. Despite this clear precedent, my colleagues now rule that there was no contract, no obligation, and no liability, because no single document contained all of the terms of the transaction. Indeed, that was the Winstar situation, where the Court ruled that the total documentation comprised an integrated contract. The Court described such arrangements as follows:

> [T]he [FHLBB] resolutions, Forbearance Letters, and other documents setting forth the accounting treatment to be accorded supervisory goodwill generated by the transactions were not mere statements of then-current regulatory policy, but in each instance were terms in an allocation of risk of regulatory change that was essential to the contract between the parties.

Winstar, 518 U.S. at 909. In Fifth Third Bank of Western Ohio v. United States, 402 F.3d 1221, 1235 (Fed. Cir. 2005), this court held that even in the absence of a single formal document stating the entire agreement between the institution and the

government, the documentary evidence constituted an agreement concerning supervisory goodwill, the court "[a]nalyzing not only the contemporaneous documents but also the circumstances surrounding the transactions[.]" 402 F.3d at 1229. As in Fifth Third Bank, "the evidence demonstrates that in light of the discussions between the Government and the acquiring thrift with regards to protections affecting capital requirements, including supervisory goodwill, the parties agreed that the acquiring thrift was to be given the favorable accounting treatment of supervisory goodwill and amortization." Id. at 1232.

The panel majority appears to mistake the undisputed evidence, for my colleagues state that "Mola here points to no evidence of any negotiations about the regulatory treatment of goodwill that could serve as evidence that the government agreed to a goodwill contract." Maj. op. at 12. This is contrary to the record, and contrary to Winstar precedent. The facts herein differ from those in D & N Bank v. United States, 331 F.3d 1374 (Fed. Cir. 2003), on which the majority relies, for "D & N . . . simply submitted an application for approval of the merger, and the Bank Board accepted it," and this court found that "there was no negotiation between D & N Bank and the Bank Board that resulted in approval of the merger." Id. at 1379. In contrast, Mola's acquisition of Merit incurred multiple rounds of negotiation, with supervisory goodwill as an essential component that was negotiated and agreed. As the Court discussed in Winstar, it was well understood that absent accounting for supervisory goodwill there would be little reason for a healthy bank to assume the liabilities of an insolvent bank,

when such assumption would render it immediately insolvent and in danger of receivership. The Court explained the purposes of supervisory goodwill:

> Supervisory goodwill was attractive to healthy thrifts for at least two reasons. First, thrift regulators let the acquiring institutions count supervisory goodwill toward their reserve requirement under 12 CFR ' 563.13 (1981). This treatment was, of course, critical to make the transaction possible in the first place, because in most cases the institution resulting from the transaction would immediately have been insolvent under federal standards if goodwill had not counted toward regulatory net worth.

518 U.S. at 850.

The panel majority errs in ruling that the approval of a supervisory merger "does not establish any contract to maintain this treatment of goodwill," maj. op. at 16, for that is what a supervisory merger is about.[1] My colleagues appear to mistake the purchase method of accounting. See, e.g., First Commerce Corp. v. United States, 335 F.3d 1373,

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[1] Expert testimony explaining the role of supervisory goodwill was presented in the Court of Federal Claims by Mr. Minijit Johal, former official of the Federal Home Loan Bank of San Francisco, explaining 12 CFR '563.13(7)(I) & (III) as requiring the "supervisory" designation for the purpose of using the purchase method of accounting, to convert goodwill based on losses into an accounting asset. My colleagues decline to accept this expertise, although the identical principle was explained in Winstar. See maj.op.at 13 n.5.

1377 n.1 (Fed. Cir. 2003) ("When the purchase method is used to account for a merger, any excess of the purchase price over the fair value of the thrift's net assets is recorded as goodwill."). Mola's negotiations leading to designation as a "supervisory case" were targeted to this purpose. See Franklin Fed. Sav. Bank v. United States, 431 F.3d 1360, 1362 (Fed. Cir. 2006) ("The thrifts desired to use the 'purchase' method of accounting, under which the newly created thrift could designate the excess of the purchase price over the fair value of all acquired assets as an intangible asset called 'supervisory goodwill,' and claim it as an asset for purposes of computing regulatory capital."); Fifth Third Bank, 402 F.3d at 1224 (same). The panel majority's further holding that 12 CFR '563.13, cited supra in Winstar, does not concern the purchase method of accounting is also off the mark, for the accounting use of supervisory goodwill to meet the reserve requirements under 12 CFR '563.13 was "critical to make the transaction possible in the first place." 518 U.S. at 850.

A contract was formed as it was in Winstar. Mola's H-(e)3 application, the negotiations, the issuance of the certificate of "supervisory case," and the various confirming documents, verified the contractual arrangement. See, e.g., Fifth Third Bank, 402 F. 3d at 1235 ("The totality of the evidence and the circumstances demonstrate that the parties intend to and did create contractual obligations which included the utilization of supervisory goodwill as an accounting treatment for capital compliance."); La Van v. United States, 382 F.3d 1340, 1346-47 (Fed. Cir. 2004) (holding that an

implied-in-fact contract was established between the government and the acquiring thrift "[a]s evidenced by an internal memorandum, the treatment of goodwill was at the epicenter of the conversion process"); LaSalle Talman Bank, F.S.B. v. United States, 317 F.3d 1363, 1370 (Fed. Cir. 2003) ("These arrangements concerning goodwill [including a Financing Agreement and a Bank Board Resolution] and the infusion of capital from various sources enabled Talman in 1986 to meet the existing capital requirements."); California Fed. Bank v. United States, 245 F.3d 1342, 1347 (Fed. Cir. 2001) (holding that even without an assistance agreement or a supervisory action agreement, the factual records of the case including various correspondence, memoranda and bank board resolutions show intent to contract with the government for specified treatment of goodwill). The panel majority's criticism that "no document" contains the entire contract does not defeat the formation of a contract. A similar procedure was discussed in Caroline Hunt Trust Estate v. United States, 470 F.3d 1044, 1050 (Fed. Cir. 2006), where this court affirmed that the acquiring institution made an offer to the government in its H-(e)3 application, and that a contract ensued when the terms were negotiated and accepted. "Whether a bargained-for exchange occurred depends on the surrounding factual circumstances." Hometown Financials, Inc. v. United States, 409 F.3d 1360, 1365 (Fed. Cir. 2005) (affirming the district court's holding that "the correspondence, memoranda, forbearance letters, and regulatory maintenance and dividend agreement gave rise to a contract which included provisions addressing goodwill").

The record establishes that there was a bargained-for exchange, and that the ensuing contract was breached by the subsequent enactment of FIRREA and the seizure and liquidation of Charter. I must, respectfully, dissent from the court's holding that there was no contract and no breach.

In the United States Court of Federal Claims

No. 95-790C

(Filed Dec. 14, 2006)

MOLA DEVELOPMENT CORPORATION,	Winstar - **Statute of Limitations; 28 U.S.C. § 2501; Accrual of Cause of Action for Breach of Contract; Contract Formation; Fifth Amendment Taking; Due Process.**
Plaintiff,	
v.	
THE UNITED STATES,	
Defendant	

Paul R. Franke, III, Murray, Franke, et al., Denver, CO, for Plaintiff.

Sameer Yerawadekar, U.S. Department of Justice, Civil Division - Commercial Litigation Branch, Washington, D.C., for Defendant.

OPINION

Williams, Judge.

This Winstar case comes before the Court on Defendant's Renewed Motion to Dismiss and the parties' Cross-Motions for Summary Judgment on

Liability. The motions present two issues: whether the action is time-barred and whether a contract was formed.

Defendant contends that the statute of limitations began to run on July 31, 1989, when the regulators sent the bank a letter designating the institution as troubled and placing restrictions on its ability to increase assets or liabilities. The Court disagrees. Because FIRREA's restrictions did not apply to Plaintiff until December 7, 1989, when FIRREA's implementing regulations became effective, Plaintiff's claim accrued at this time, and its complaint of December 5, 1995, was timely filed. However, because the Government's approval of Plaintiff's acquisition of the failing thrift here did not give rise to a contract, Defendant's motion for summary judgment is granted.

Background[1]

The circumstances surrounding the thrift crisis of the early 1980s and the ensuing enactment of the Financial Institution Reform, Recovery and Enforcement Act (FIRREA) have been extensively set forth in United States v. Winstar Corp., 518 U.S. 839 (1996) and its progeny. These circumstances are set out in brief below.

Rising interest rates during the 1980s led to the insolvency of many savings and loan institutions (thrifts). This pattern threatened to exhaust the

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[1] This background is derived from appendices accompanying the parties' cross-motions for summary judgment.

insurance fund of the Federal Savings and Loan Insurance Corporation (FSLIC), the agency charged with regulating the federally insured thrift industry and insuring consumer deposits in thrifts. Winstar, 518 U.S. at 846-47.

To deal with this crisis, the Federal Home Loan Bank Board (FHLBB), the agency authorized to charter and regulate federal savings and loan associations, encouraged healthy thrifts to purchase insolvent thrifts in supervisory mergers, and permitted the acquiring institution to allocate any shortfall between liabilities and real assets to an intangible asset known as "supervisory goodwill."[2] Barron Bancshares, Inc. v. United States, 366 F.3d 1360, 1364 (Fed. Cir. 2004). The FHLBB allowed the merged bank to count supervisory goodwill toward its reserve capital requirements and to amortize the goodwill over an extended period of time, which frequently exceeded the life of the underlying asset. Winstar, 518. U.S. at 850-51. In addition, the FSLIC

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[2] In 1981 and 1982, generally accepted accounting principles (GAAP) allowed two methods of accounting for mergers and acquisitions, either "purchase of assets" or "pooling of interest." Under the pooling method, "separate businesses are combined, and future operating results are based on the original amounts of the respective assets and liabilities." First Fed. Lincoln Bank v. United States, 54 Fed. Cl. 446, 448 n.4 (2002). The purchase method "revalues the assets and liabilities of the acquired entity from their original book value to their market value at the time of the acquisition." Id. At the time of these transactions, the purchase method of accounting permitted the acquiring institution to record on its books the excess of the acquired entity's liabilities over its assets on a marked-to-market basis as an intangible asset known as goodwill, or in a supervisory merger, supervisory goodwill.

offered cash contributions in the form of capital credits that acquiring thrifts were permitted to count as permanent credits to regulatory capital and granted regulatory forbearances from enforcing a thrift's regulatory capital requirements for a specified period of time. Id. at 853.

Nonetheless, the crisis in the savings and loan industry continued, prompting Congress to enact the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) to prevent the collapse of the industry, attack the causes of the crisis, and restore public confidence. Winstar, 518 U.S. at 856. FIRREA abolished the FHLBB and the FSLIC, transferred thrift insurance activities to the Federal Deposit Insurance Corporation (FDIC), established the Office of Thrift Supervision (OTS) as the new thrift regulatory agency, mandated a minimum capital requirement for thrifts, and prohibited the use of supervisory goodwill. Id. In FIRREA's wake, many thrifts were unable to comply with regulatory capital requirements. Id. at 856-58.

Mola Development Corporation

Mola Development Corporation (MDC) was founded in Huntington Beach, California in 1976 as a real estate development company. Pl.'s Resp. App. (Pl. App.) 8. Frank J. Mola was the founder, president and chairman of MDC. Id. In 1984, MDC diversified its business lines by acquiring a controlling interest in Orange Coast Savings and Loan Association, a federally insured savings and loan. Pl. App. 9. Orange Coast Savings and Loan was a "substantial supervisory concern" when it was

acquired by MDC. Id. After acquiring the thrift, MDC changed Orange Coast Savings and Loan's name to Charter Savings Bank (Charter) and, by March 31, 1988, had reversed its adverse operating trend. Id.

The Merit Savings Bank Acquisition

Merit Savings Bank (Merit) was a minority-owned financial institution founded in 1962 to serve the financial needs of the Japanese Community in Little Tokyo, Los Angeles. Pl. Resp. 7. In 1986, the FHLBB had concerns about Merit's financial viability and began to look for a healthy bank to merge with Merit. See Pl. App. 20, 23-25. Merit itself also looked for merger partners, but by December 1987, still had not found one, and the Federal Home Loan Bank of San Francisco (FHLBSF) proposed that Merit be placed on the FHLBB's bidding schedule to be sold in June 1988. Id. at 27.

Following its success with the Charter acquisition, in September 1987, MDC hired Kaplan, Smith & Associates (Kaplan Smith) to assist it in identifying a thrift to target for another potential acquisition. Pl. App. 29-32. MDC began working with R. Brian O'Donnell and Munjit Johal of Kaplan Smith, both of whom were former FHLBSF employees familiar with the FHLBB rules relating to supervisory acquisitions. Affidavit of Munjit Johal dated Aug. 14, 2003 (Johal Aff.) ¶¶ 8-9, 13-14, Pl. App. 2. Kaplan Smith identified Merit to MDC as a thrift in need of a merger. Johal Aff. ¶¶ 16-18, Pl. App. 3; Pl. App. 11-12. In late December 1987, MDC and Charter sent a Letter of Intent to Merit setting

forth an agreement to have Merit merge into Charter and notified the FHLBB Supervisory Agent. Pl. App. 34. On January 15, 1988, MDC and Merit entered into an "Agreement and Plan of Merger" under which MDC agreed to purchase all the shares of Merit for a total price of $1,000,756.20. Pl. App. 11.

Shortly thereafter, on January 28, 1988, MDC met with the FHLBSF to discuss issues related to the merger. Pl. App. 78-82. According to Supervisory Analyst D. G. Kvartunas's minutes of that meeting, MDC, through Mr. O'Donnell, "asked if the merger [could] be viewed as a supervisory case." Pl. App. 79. These minutes continued:

> Mr. O'Donnell asked if the merger can be viewed as a supervisory case. MDC wants to get Merit classified as such because of the accounting and tax implications for Charter. Mr. Davis [of the FHLBSF] said we will pursue it as a supervisory case and will discuss it with the appropriate powers in San Francisco and the Bank Board. However, he pointed out that the kind of latitude we give will set a precedence (sic). Mr. Davis asked that the Charter team provide us with a list of what they want. At this point Mr. O'Donnell distributed the attached list of forbearances.[3]

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[3] The referenced list is not attached to the minutes in Plaintiff's appendix and is not in the record.

Id. Through the acquisition of merit, MDC and Charter "expect[ed] to benefit from the economies of a larger institution and become a major player in the market." Id. As of that time, MDC had "already reviewed some of the Merit properties and [had] moved personnel from MDC to Charter to concentrate on loan workouts." Pl. App. 78. Mr. Mola had already authorized site plans for some of the projects and "wanted to start things before the application [was] approved." Id.

Also at this meeting, Mr. Mola said he wanted to contribute real property, the Charter Center, but the FHLBSF representatives expressed reluctance to allow MDC to contribute $8 million in noncash assets. Id. at 15, 79; Pl. Resp. 10. Mr. Mola responded that MDC could make a cash contribution if necessary. Pl. App. 79.

Representatives from the FHLBSF and MDC met again on February 3, 1988, and the FHLBSF reiterated that the noncash approach suggested by MDC "was not viable under the current policy." Pl. App. 81. Also in February 1988, Mr. Johal of Kaplan Smith contacted two representatives of the FHLBB and stated that MDC could not pursue the Merit merger unless the FHLBB characterized Merit as a supervisory acquisition and the FHLBB considered approving a noncash contribution to satisfy the capital requirements of the resulting institution. Johal Aff. ¶ 24, Pl. App. 4.

On April 19, 1988, MDC filed its Application H-(e)3 with the FHLBB to obtain regulatory approval of the acquisition of Merit. Pl. App. 6-13.

MDC and Charter proposed to record the acquisition of Merit as a purchase transaction under generally accepted accounting principles ("GAAP"), with any resulting goodwill to be amortized according to GAAP. Pl. App. 12.

The H-(e)(3) Application included the following list of regulatory forbearances requested by MDC and Charter:

> 1. The assets acquired by Charter from Merit will be deemed to have been acquired in a merger instituted for supervisory reasons. Therefore, pursuant to any section of the regulations administered by the Bank Board where classified assets or scheduled items are referred to as "assets acquired in a merger instituted for supervisory reasons," classified assets or scheduled items attributable to Merit shall not be deemed to be classified assets or scheduled items in determining whether Charter meets the requirements of such sections[4] following the Effective Date.

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[4] This refers to 12 C.F.R. § 545.74 (regarding the amount an institution may invest in service corporations), 12 C.F.R. § 546.2 (determining whether the resulting institution of a merger met the regulatory capital requirements under 12 C.F.R. § 563.13(b)), and 12 C.F.R. § 563.8 (concerning the required ratio of scheduled items to specified assets for outside borrowing).

2. Section 563.13 (Regulatory Capital Requirement) of the Rules and Regulations for the Federal Savings and Loan Insurance Corporation ("Insurance Regulations") provides in subsection (b)(7)(iii) for the possible exclusion or moderation of the combined assets, investments, base liabilities and increased liabilities of [Merit] by [Charter] in computing the regulatory capital requirements of this section provided the merger was instituted for supervisory reasons. Therefore, the [FSLIC] will forbear, for a period of five years following the date of the consummation of the merger ("Effective Date"), from exercising its authority, under Section 563.13 of the Insurance Regulations, for any failure of Charter to meet the regulatory capital requirements of Section 563.13 arising solely from (1) (a) any increase in the contingency component attributable to the assets of Merit existing as of the Effective Date, and, (b) any increase in the total liabilities, increased liabilities, or base liabilities of Charter as of the Effective Date by reason of Charter's assumption of Merit's liabilities; or (2) Charter's assumption of the regulatory capital deficiency of Merit as of the Effective Date.

3. For a period of five years following the Effective Date, the Board will waive or forbear from enforcement of the regulatory capital requirements as stated in Insurance Regulation 563.13 provided that the Board may lawfully waive or forbear with respect to such requirements, and provided further that failure to meet the requirements is due to (1) (a) operating losses on acquired assets; (b) capital losses sustained by Charter upon disposition of acquired assets; (c) acquired assets that are to become classifiable; and (d) the assumption of Merit's liabilities; or (2) assumption of Merit's regulatory capital deficiency as of the Effective Date.

4. For the purpose of calculating any holding company net worth maintenance requirements of Mola Development Corporation for Charter, the Board will exclude, for a period of five years, the asset and liability balances of Merit.

5. For a period of one year following the Effective Date, in determining whether a penalty shall be assessed against or paid by Charter pursuant to Section 523.12 (Deficiencies and Penalties) of the Rules and Regulations for the Federal Home

Loan Bank System ("Bank System Regulations"), the liquidity requirements of Section 523.11 (Liquidity Requirements) of the Bank System Regulations as applied to Charter shall be reduced by (1) the amount of Merit's liquidity deficiencies existing at the Effective Date and (2) any aggregate net withdrawals (excess of withdrawals over cash savings received) from Merit's offices after the Effective Date.

6. Charter shall stipulate to the FSLIC in writing that unless prior written approval has been obtained from the Supervisory Agency with the concurrence of the Director of ORPOS, dividends paid by Charter in any fiscal year shall be limited to 50% of its net income for that fiscal year . . . provided that any dividends permitted under this limitation may be deferred and paid in a subsequent year, but in no event will dividends be paid that would reduce the net worth of the association below the level required by I.R. 563.13.

Def.'s Mot. To Dismiss, App. (Def. App.) 9-10.

The merger application requested that the transaction be characterized as a supervisory

merger. The Accounting Procedures Section of the application provided:

> The Applicant [MDC] and Charter proposed to record the acquisition of Merit as a purchase transaction under generally accepted accounting principles (GAAP), Accounting Principle Board Opinion No. 16, and Statement of Financial Accounting Standards No. 72 ("FASB No. 72"). Push-down accounting will be applied as permitted by GAAP and FHLBB Memorandum R 55a. Accordingly, the assets and liabilities will be recorded at fair value at the date of acquisition. If the fair value of the liabilities assumed exceeds the fair value of the tangible and indentifiable intangible assets acquired (FASB No. 72 goodwill), that amount would be amortized to expense over a period no greater than the estimated remaining life of the long-term interest-bearing assets acquired. Amortization shall follow the guidance set forth in paragraph 5 of FASB No. 72. Any additional goodwill resulting from excess of purchase price over book value recognized in the acquisition is to be amortized in accordance with APB No. 17 over a period no greater than 25 years.

Pl. App. 12.

In late April 1988, the FHLBB completed a review worksheet of the H-(e)3 application and noted that 1) MDC intended to use purchase accounting for the acquisition, 2) goodwill would be included in the resulting institution's regulatory capital, and 3) the use of goodwill complied with the FHLBB's policy guidelines. Pl. App. 84.

On May 5, 1988, a representative of the FHLBSF held a telephonic conference with Jon Maddox, the President and CEO of MDC, and requested that an additional contribution of tangible capital be made. Pl. App. 85-86. On May 11, 1988, the FHLBSF advised Mr. Mola that the FHLBB would approve the merger if MDC contributed enough cash to the resulting institution to meet its minimum capital regulatory requirement. Pl. App. 86. On May 17, 1988, the President of Charter sent a letter to the FHLBSF confirming their May 11, 1988 agreement that the merger would be approved subject to MDC contributing sufficient cash to meet the minimum regulatory capital requirements. Pl. App. 88.

On May 18, 1988, Supervisory Agent Anthony M. Paula sent a letter to the FHLBB regarding MDC's application, noting that a considerable amount of goodwill would be created in the transaction and that "[because] Merit is a supervisory case, certain forbearances [could] be approved." Pl. App. 37-39. Agent Paula also noted that, notwithstanding the forbearances granted, "Charter shall maintain its required regulatory capital level exclusive of the noncash contribution." Id. at 38.

On May 19, 1988, the FHLBSF recommended that the merger be approved if MDC agreed to the following:

1. Mola [MDC] will contribute enough cash to bring the Regulatory Capital of the resulting institution to the required level without the noncash contribution or capital forbearances, whatever that sum is when the transaction is consummated. The calculation shall exclude Merit's scheduled items as of 09/30/87.

2. Charter will maintain capital at minimum required levels without the noncash contribution.

3. There will be no substitution of debt liability on the Charter Centre.

4. Cumulative capital improvements on Charter Centre shall not exceed $1 million dollars without the prior written consent of the Supervisory Agent.

5. The current net worth maintenance agreement will stay intact.

6. Mola [MDC] will guarantee cash flow of Charter Centre.

Pl. App. 86.

After these conditions were presented by the FHLBB on May 20, 1988, Mr. Mola proposed the following modifications:

> 2. Charter will maintain capital at minimum levels without the noncash contribution. For purposes of calculating the minimum requirements, such calculation shall exclude the following attributable to the acquisition of Merit: (a) operating losses or acquired assets; (b) capital losses sustained upon disposition of acquired assets; (c) acquired assets that are or become scheduled items; (d) the assumption of Merit's liabilities; and (e) scheduled items and or classified assets.
>
> 7. The acquisition is being instituted for supervisory purposes.

Pl. App. 86-87.

On May 23, 1988, the FHLBB informed Charter that the FHLBB would not accept the modifications proposed on May 20. On May 24, 1988, Charter advised the FHLBB that MDC had accepted the conditions of approval set out in the May 19, 1988 letter from the FHLBB, but wanted a statement that the acquisition was instituted for supervisory purposes "because of their use of net operating losses for tax purposes." Id. The FHLBB agreed to this request. Id.

On June 7, 1988, Supervisory Agent Paula sent a letter to the FHLBB's Office of General Counsel in which he, among other things, recommended that the Bank Board classify Merit as a supervisory case given its financial difficulties. Pl. App. 92-94. The letter noted that "none of the forbearances requested by the applicant (except the exclusion of Merit's September 30, 1987 Scheduled Items from the calculation of the minimum capital requirement) will be approved." Id. at 94.[5] Supervisory Agent Paula characterized MDC's reason for having Merit classified as a supervisory case as follows:

> Section 1730(q)(8) of the National Housing Act (the "Act") provides that the FSLIC may give consideration that a proposed acquisition will result in the loss or reduction of the tax benefits of

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[5] Agent Paula listed the requested forbearances which had not been approved:

> Mola has requested that certain forbearances be granted with respect to compliance with the resulting institution's regulatory capital requirement, reduction of liquidity requirement, dividend limitation, and the regulatory net worth maintenance stipulation with the holding company. Furthermore, Mola has requested approval for liability growth in excess of the limitation set forth by Insurance Regulation 563.13-1, as well as for certain lease transactions and an agreement to utilize the expertise, knowledge and services of Mola to solve the real estate problems that would be acquired from Merit.

Pl. App. 92-93.

> an insured institution's net operating loss carryforwards under Section 382 of Title 26 if such net operating loss carryforwards result from the insured institution's acquisition of one or more insured institution under Section 1729(f) or 1730(m) of this Act or pursuant to acquisitions that are otherwise deemed to be supervisory cases by the FSLIC. In order to utilize such consideration by the FSLIC, the applicant has requested that Merit be deemed a supervisory case by the Bank Board and that the subject acquisition be considered as being instituted for supervisory purposes.

Pl. App. 94.

In a June 21, 1988 memorandum, Supervisory Agent Paula stated that "in order for Mola to utilize the benefits of a tax free reorganization and the net operating loss carryforwards of Merit, the Bank Board has deemed Merit a Supervisory Case for the purposes of this acquisition . . . ." Pl. App. 99. The memorandum also stated that MDC agreed to the conditions set out by the FHLBB. Id. at 99-103.

By letter dated June 24, 1988, the FHLBB approved MDC's H-(e)3 application subject to a number of conditions. The approval letter stated in pertinent part:

> Our understanding of the proposed transaction is as follows: Mola

Development Corporation (Mola) shall purchase all of the issued and outstanding shares (126,678) of Merit for a total purchase price of $1,000,756.00 or $7.90 per share. The cash will be distributed to holders of Merit's common stock upon surrender by such shareholders of their certificates representing such shares. As of the closing, Merit stock certificates shall automatically, by operation of law, be cancelled. Mola will then merge the newly acquired entity into Charter. The regulatory capital of the resulting institution at the date of the acquisition of Merit will be approximately $10.9 million, or 2.0 percent of liabilities. In order to bring the regulatory capital of the resulting institution to the required level, Mola has elected to contribute real estate, the Charter Centre, that will result in regulatory capital of $19.6 million, or 4.0 percent of liabilities.

Pursuant to the authority delegated to the Principal Supervisory Agent by the Federal Home Loan Bank Board (the Bank Board) under Insurance Regulation Section 574.8, the application is hereby approved subject to the following conditions:

1. Mola will contribute, on the effective date of the acquisition, enough cash

to bring the Regulatory Capital of the resulting institution to the level required by 563.13, excluding the noncash contribution of the Charter Centre or any capital forbearances, as of the date the acquisition is consummated. The calculation for the cash contribution shall exclude scheduled items of Merit as of September 30, 1987;

2. Within one week of the effective date of the acquisition, Charter will provide to the Supervisory Agent an explanation of the calculation of the cash contribution;

3. Charter will maintain capital at the minimum required level exclusive of the noncash contribution;

4. There will be no substitution of the debt liability on the Charter Centre;

5. Cumulative capital improvements on Charter Centre shall not exceed $1 million without the prior written consent of the Supervisory Agent;

6. The current net worth maintenance agreement dated August 15, 1984, between Mola and the Bank Board will stay intact;

7. Mola will provide a written guarantee to the Supervisory Agent, within 30 days of the effective date of the acquisition, that the holding company will reimburse the association for any cashflow deficiencies of the Charter Centre;

8. The resulting institution shall stipulate that unless prior written approval has been obtained . . . dividends paid by Charter in any fiscal year shall be limited to 50 percent of their net income for that fiscal year, . . . but in no event will dividends be paid that would reduce the net worth of the association below its fully phased in capital requirement;

In addition, your request to increase the liabilities of Charter in excess of the limitation set forth in Insurance Regulation 563.13-1 is hereby approved. Furthermore, your request to allow Charter to utilize the consulting services of Mola in connection with the work out of problem assets acquired from Merit is hereby approved under the authority of Insurance Regulation Sections 584.3(a)(7) and 584.3(e).

Def. App. 11-13. The regulators did not enter into an assistance agreement, and the FHLBB did not issue any resolutions approving the acquisition.

The closing for the merger between Merit and MDC occurred on July 29, 1988, and MDC made a cash contribution of $2.5 million to bring the resulting institution into regulatory capital compliance. Pl. App. 4. The merger was classified as one instituted for supervisory purposes. Id. The merger was "unassisted" in that the Government did not provide a cash payment to support the acquisitions, and there was no assistance agreement.

FIRREA

FIRREA was enacted on August 9, 1989, in response to the savings and loan crisis. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in various sections of 12 U.S.C.) The provisions prescribed uniformly applicable capital standards for savings associations. 12 U.S.C. § 1464(t)(1)(A) (2000). These standards included maintaining "core capital in an amount not less than 3 percent of the savings association's total assets." § 1464(t)(2)(A). Core capital was defined to exclude "any unidentifiable intangible assets" such as goodwill. § 1464(t)(9)(A). FIRREA mandated that the newly-created Office of Thrift Supervision (OTS)[6] promulgate final regulations not later than 90 days after August 9, 1989, and that those regulations would become effective not later than 120 days after August 9, 1989. § 1464(t)(1)(D).

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[6] FIRREA replaced the FHLBB with the OTS which had the responsibility of regulating all federally insured savings associations. Pub. L. 101-73, § 101(6), 103 Stat. at 187.

Examination of Charter

In April 1989, the FHLBB conducted a Regular Federal Examination of Charter. Prior examinations reflected that as a result of Charter's acquisition of Merit on July 29, 1988, "the association was left thinly capitalized with a large amount of goodwill on its books." Pl. App. 114. The scope of the April 1989 Examination focused on the correction of past deficiencies, the "progress in merging the Operations of Charter and Merit" and "the future capital plans of the association." Pl. App. 114. In an internal memorandum prior to the examination, the FHLBB stated that "Charter's performance has been relatively flat and on average negative." Pl. App. 115. The FHLBB attributed the poor operating performance to "its acquisition of Merit . . . [and dependence] on high-cost liabilities." Id. The FHLBB also noted that prior to the examination Charter had "negative tangible capital of $513,000" due to the Merit acquisition which generated approximately $19 million in goodwill. Pl. App. 116. In a letter dated July 31, 1989, following up on the April 24, 1989 Report of Examination, the FHLBB designated Charter as a "troubled institution" stating in pertinent part:

> We have determined that Charter Savings Bank (Charter) is a troubled institution as defined in Office of Regulatory Activities Regulatory Bulletin 3a (RB3a).[7] As detailed in our

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[7] RB3a, issued on September 7, 1988, was entitled "Policy Statement on Growth for Insured Institutions" and mandated limiting the growth of institutions that were deemed

> Report of Examination as of April 24, 1989, this office has serious concerns regarding your institution's level of tangible capital, results of operations and effectiveness of management. RB3a generally restricts liability growth of troubled institutions to interest credited and funding of legally binding loan commitments and loans-in-process until such time as the institution has corrected the deficiencies which resulted in the determination that it is troubled.
>
> Upon review of Charter's business plan (the plan) submitted to this office on June 9, 1989, we have the following concerns:
>
> . . .

"troubled." The bulletin defined troubled institutions as "those [institutions] with a MACRO rating of 4 or 5, institutions failing their minimum regulatory capital requirement, or institutions otherwise identified as troubled by supervisory personnel." The bulletin stated:

> All troubled institutions must submit and be subject to a capital restoration plan that, among other things, prohibits them from increasing their liabilities in excess of the amount of interest credited unless approved by the PSA [Primary Supervisory Agents]. PSAs may permit an institution's liability growth to exceed interest credited when required to fund existing legally binding loan commitments and loans-in-process.

Regulatory Bulletin 3a (September 7, 1988) (rescinded by RB 3a-1 on January 9, 1990).

(6) The plan does not adequately address capital restoration of the institution. Beginning January 1, 1990, Charter will be required to meet a higher minimum capital requirement and will not be able to use the maturity matching credit to reduce its minimum capital requirement to below four percent of total liabilities. In the financial projections provided in the plan, Charter will not have regulatory capital of four percent of liabilities until fourth quarter 1990.

Furthermore, the plan should specifically address Charter's need for tangible capital. The Financial Institutions Reform, Recovery and Enforcement Act will require all insured institutions to have tangible capital of at least 1.5 percent of liabilities. For Charter, this will mean a cash infusion of approximately $11 million. This figure could increase if the appraisals ordered as the result of the recent examination indicate further downward adjustments to the properties in question. It is our opinion that Charter's need for tangible capital significantly affects the institution's business plans.

Accordingly, Charter is hereby instructed to file a revised business and capital restoration plan (the revised

plan) with its Supervisory Agent that details how the institution will correct these problems as well as those contained in the Report of Examination, and which limits the institution's liability growth to the greater of either (1) the amount of interest credited or (2) the amount necessary to fund existing legally binding loan commitments and loans in progress. The revised plan should be . . . filed within 45 days of your receipt of this letter.

Until such time that Charter's revised plan has been approved in writing by the Supervisory Agent, Charter is instructed to comply with this letter. Effective immediately and until further notice, Charter is directed to ensure that an increase in assets or liabilities facilitates no purpose other than to:

(1) Maintain minimal regulatory liquidity;

(2) Fund normal operating expenses, interest on deposits, and other legally binding debt instruments;

(3) Protect the value of the institution's assets, provided that the institution obtains the prior written approval of the Supervisory Agent; and

> (4) Honor legally binding loan commitments, provide that waiver of the loans-to-one-borrower regulation (if necessary), is obtained from the Supervisory Agent (a list of legally binding loan commitments existing as of the date of your receipt of this letter should be submitted with the revised plan).

Def. App. 19-21.

On August 21, 1989, Supervisory Agent Paula recommended that Charter be transferred to Special Surveillance in the FHLBB "in order to rehabilitate the institution and mitigate the risks to the insurance fund." Pl. App. 47. In his recommendation memorandum, Mr. Paula noted that after the acquisition of Merit, the goodwill Charter had anticipated "increased 74 percent during the first quarter following the acquisition" resulting in a decrease in tangible capital "from positive $2.7 million to a negative $5.0 million." Id. at 46. The memorandum stated that the Report of Examination in April 1989 assigned Charter a rating of "4" indicating "significant deficiencies in management compliance and capability, in the capital position of the institution, and in the results of operations." Id. According to the memorandum, as of June 30, 1989, the institution had negative tangible capital of $4,223,000, and "Frank J. Mola . . . indicated that he [was] aware of the imminent regulatory changes which will require Charter to have 1.5 percent tangible capital and will make the necessary cash infusion once the regulation has taken effect." Pl.

App. 47. Supervisory Agent Paula further stated that "Charter may fail its minimum capital requirements by January 1, 1990." Id. The recommendation concluded that "the General Surveillance team will assist Special Surveillance in evaluating the adequacy of the response to the ROE, and the adequacy of the revised business and capital restoration plan requested in our RB3a letter to the institution on July 31, 1989." Pl. App. 48.

By letter dated September 14, 1989, Charter's Board of Directors responded to the July 31, 1989, objecting to OTS' classification of Charter as a "troubled" institution and stating:

> Although you have this Board's assurance that this Association will comply with the directives outlined in the July 31 letter until a revised business plan has been approved by Charter's Supervisory Agent, please be advised that this Board takes vigorous objection to the classification of Charter as 'troubled.'
>
> > Your current assessment of Charter is based largely upon the tangible capital requirements established by the recently enacted [FIRREA]. At best, classification based upon Charter's current tangible capital position is premature, particularly given that Charter's level of intangible capital was

> essentially inherited, with your approval, as a result of the supervisory acquisition of Merit. You further cite as justification 'results of operation and effectiveness of management,' as described in the Report of Examination as of April 24, 1989.
>
> . . .
>
> We concede that responding to the new tangible capital requirement established by FIRREA will be a significant challenge but is one that must be faced by some 50% of the industry. We are currently in compliance. The matter of continued compliance has been under review for some time by this Board and the Association's parent. We are in the process of developing a comprehensive three-year business plan.

Pl. App. 56-57.

On October 23, 1989, Charter representatives Frank Mola, Chairman of the Board of MDC, Jon Maddox, President and CEO of MDC, and Vince Mola met with OTS representatives Tom H. Sharkey, Assistant Director, Agency Group, Special Surveillance, and Sandy F. Geluz, an OTS field manager. A contemporaneous memorandum prepared by Ms. Geluz states:

> The meeting was called by Mr. Sharkey to discuss the need for capital and to improve the relationship between the institution and OTS Staff.
>
> . . . .
>
> [Mr. Sharkey] pointed out [Charter's] current tangible capital is a deficit of $4.3 million; they need tangible capital of $5.7 million by December 7, 1989. Charter Savings also needs to have core capital of $11.5 million. Mr. Sharkey indicated that supervisory goodwill needs to be clarified because it is unclear if only FSLIC assisted acquisitions qualify. Frank Mola indicated that he would appreciate any credit that could be given, but he is prepared to make the necessary cash infusion. He stated that as soon as he is notified of the amount needed, he may need 60 days to come up with the funds.

Pl. App. 49.

Regulations Implementing FIRREA

On November 9, 1989, OTS sent another letter to the board of directors of Charter regarding FIRREA's capital requirements, stating:

> On November 7, the Office of Thrift Supervision issued new regulations governing the minimum capital standards that will apply to the thrift

industry, effective December 7, 1989. These standards were adopted following the Notice of Proposed Rulemaking issued by the Federal Home Loan Bank Board on December 15, 1988, as modified in order to respond to public comments on that proposal and to conform with the requirements of the [FIRREA].

These regulations required each thrift institution to hold capital at least sufficient to meet three requirements -- tangible capital, core capital (or the "leverage ration"), and risk-based capital. The statute and the implementing regulations require institutions that fail any one of these three standards to take certain actions. The purpose of this letter it to draw your attention to these actions.

. . .

Based on the data submitted in your Thrift Financial Report from June 30, 1989, we believe that Charter Savings Bank will fail one or more of the capital requirements imposed on December 7, 1989. If Charter Savings Bank has already submitted a capital restoration plan in accordance with RB-3a, you must submit a revised capital restoration plan . . . which indicates how Charter Savings Bank will meet its new capital requirement in accordance

> with FIRREA, or provide us with sufficient information to demonstrate that Charter Savings Bank meets the new standard.

Pl. App. 51-52.

Ronald E. Jackson, a member of the board of directors of Charter during 1989, testified that as of September 1989 "the regulators were not honoring their treatment of goodwill in the manner which we at Charter expected." Def. App. 32. Jon Maddox, Charter's president and CEO, testified that the OTS's July 31, 1989 letter impacted Charter's operations negatively as follows:

> Our inability to fund loans promptly without regulatory approval, our inability to make management decisions day-to-day without regulatory approval does impact day-to-day operations.

Def. App. 39-40. Mr. Maddox considered this significant. Id. at 40.

As of December 7, 1989, Charter was not permitted to utilize goodwill for purposes of calculating Charter's tangible capital, and Charter failed to meet its minimum capital requirements. Pl. App. 54. On June 15, 1990, Charter was seized by OTS and transferred to the Resolution Trust Company (RTC), also created by FIRREA, for liquidation. Pl. App. 22.

Discussion

Statute of Limitations

Plaintiff filed its Complaint in the instant matter on December 5, 1995, alleging:

> Through FIRREA and its implementing regulations, the Government abrogated and breached its commitment made to MDC when the FHLBB approved the Acquisition [merger of Merit into Charter] in that MDC was no longer permitted under FIRREA to fully record as capital the supervisory goodwill resulting from the Acquisition.

Compl. ¶ 5.[8] Defendant argues that Plaintiff's claim for breach of contract accrued on July 31, 1989 the date of a letter from the regulators placing restrictions on Charter, or on September 14, 1989, the date of Charter's reply to this letter.

Under the Tucker Act, any claim over which this Court has jurisdiction "shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (2000). The six-year statute of limitations is "a jurisdictional requirement for a suit in the Court of Federal Claims." John R. Sand & Gravel Co. v. United

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[8] The Complaint contains five counts: (1) Damages for breach of contract "not less than $20 million;" (2) restitution based on rescission of contract; (3) compensation for taking of property rights; (4) damages for deprivation of property without due process, and (5) damages for retroactive application of law in violation of due process. Compl. at 17-20.

States, 457 F.3d 1345, 1354 (Fed. Cir. 2006); see also MacLean v. United States, 454 F.3d 1334, 1336 (Fed. Cir. 2006) ("In the Court of Federal Claims, the statute of limitations is a jurisdictional requirement attached by Congress as a condition of the Government's waiver of sovereign immunity and, as such, must be strictly construed.") (internal quotation omitted).

"A claim first accrues for purposes of 28 U.S.C. § 2501 when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." Alder Terrace, Inc. v. United States, 161 F.3d 1372, 1377 (Fed. Cir.1998) (internal quotation omitted); see Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988) ("[A] cause of action against the government has 'first accrued' only when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence.").

In breach of contract cases "a cause of action accrues when the breach occurs." Alder Terrace, 161 F.3d at 1377 (quoting Manufacturers Aircraft Ass'n v. United States, 77 Ct. Cl. 481, 523 (1933)). "Failure to perform a contractual duty when it is due is a breach of contract." Winstar Corp. v. United States, 64 F.3d 1531, 1545 (Fed. Cir. 1995), aff'd, 518 U.S. 839 (1996). In Winstar, the Supreme Court accepted the Federal Circuit's conclusion that "the Government breached [its] contracts when, pursuant to the new regulatory capital requirements imposed by FIRREA, the federal regulatory agencies limited the use of supervisory goodwill and capital credits in

calculating respondents' net worth." 518 U.S. at 870. In Plaintiffs in Winstar-Related Cases v. United States, 37 Fed. Cl. 174, 184 (1997), the Court of Federal Claims concluded that "FIRREA did not legally require plaintiffs to act in any certain way before the effective date of the regulations" and therefore found that the breach occurred on the effective date of the regulations, i.e., on December 7, 1995, not upon the passage of FIRREA. Thus, suits filed within six years of the effective date of the regulations were held to be timely. Id.[9]

In Bank of America, FSB v. United States, 51 Fed. Cl. 500, 506 (2002), the Court concluded that Plaintiffs in Winstar-Related Cases did not establish a bright-line rule that the date of FIRREA's implementing regulations triggered accrual of Winstar actions:

> We did not . . . rule out the possibility other actions taken by the government prior to December 7, 1989 could similarly trigger the statute of limitations. Indeed, the regulations were legally significant because '[o]nce

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[9] Two other actions, filed after December 7, 1995, were dismissed as untimely, and both dismissals were affirmed by the Federal Circuit because the complaints had been filed more than six years after the regulations went into effect. Ariadne Financial Services Pty. Ltd. v. United States, 133 F.3d 874, 880 (Fed. Cir. 1998); Shane v. United States, 161 F.3d 723, 724 (Fed. Cir. 1998). In Ariadne, the Federal Circuit held that "[t]he government's liability was fixed when it refused to allow use of the asset as it had promised," but did not have reason to determine what the exact date of the breach was in that case. 133 F.3d at 879.

> [they] took effect, thrifts were legally subject to new capital standards that were in direct contradiction to the terms of their forbearance agreements . . . . At this point, the Government's breach of contract was actual and harm to plaintiffs was inherent and obvious.' It follows, therefore, that a government action which contradicted plaintiffs' forbearance agreements – for instance, one that interfered with their right to treat supervisory goodwill as capital – could likewise mark the claim's accrual. At the heart of our . . . inquiry, then, is a single question: when did [the thrift] first become subject to the restrictions imposed by FIRREA?

Bank of America, 51 Fed. Cl. at 506 (citations omitted).

The Bank of America Court went on to hold that the claim for the breach of the goodwill contract there accrued no later than October 6, 1989, the date of an OTS letter conditioning a second merger on meeting FIRREA's capital requirements. Id. at 510. That letter conditioned approval for the purchase on the infusion, by the plaintiffs, of "additional capital into [the institution] . . . in the amount necessary for [the institution] to immediately meet the 1.5% tangible and 3% core capital requirements as promulgated under [FIRREA]." Id. at 504 (emphasis added, citations omitted). As the Court recognized, "the approval letter effectively accelerated the application of FIRREA." Id. at 510.

In the instant case, Defendant argues that either the July 31, 1989 letter from the FHLBB placing restrictions on Charter, or Charter's September 14, 1989 response effectively accelerated the application of FIRREA, thus triggering accrual of the cause of action. Specifically, Defendant argues that the July 31, 1989 letter placed restrictions on Charter's ability to increase assets or liabilities, suggesting that the FHLBB was accelerating application of FIRREA's tangible capital requirements to Charter, thereby breaching the alleged contract, and that Charter's September 14 response indicated Plaintiff's acknowledgment of such breach.

The Court disagrees. The July 31 letter was a follow-up to the FHLBB's April 24 regularly conducted examination of Charter. That examination resulted in Charter's designation as a "troubled bank" which triggered a host of salutary regulatory restrictions under a pre-existing Regulatory Bulletin, RB3a, -- including the very limitations on growth and increasing liabilities set forth in the July 31 letter. It was Charter's designation as a "troubled bank" which prompted regulatory review of Charter's business plan of June 9, 1989. It was in this context that the regulators required Charter to submit a revised business plan, taking into account the upcoming, future tangible capital requirements which would be imposed by FIRREA. To the extent the July 31 letter imposed an immediate harm on Charter, such harm was not due to an accelerated application of FIRREA -- the alleged breach claimed here. Rather, the harm resulting from the July 31 letter -- limitations on growth and restrictions on

increases in assets or liabilities -- stemmed from Charter's poor operating performance reflected in the April Report of Examination. These limitations did not purport to be an acceleration of FIRREA, but interim restrictions applied under RB3a until Charter's revised business plan could be approved and "until such time as the institution has corrected the deficiencies which resulted in the determination that it is troubled." Def. App. 19-21.

Moreover, the July 31 letter recognized that FIRREA's impending restrictions were not currently being applied to Charter (RB3a's restrictions were) and that FIRREA's restrictions would be applied in the future. The July 31 letter stated that FIRREA's capital requirements "will require all insured institutions to have tangible capital of at least 1.5 percent of liabilities," and that "beginning January 1, 1990, Charter will be required to meet a higher minimum capital requirement to below four percent of total liabilities." Pl. App. 42-43. (emphasis added)[10]

Further, Charter's September 14, 1989 response did not trigger the statute of limitations governing its breach claim. While Charter's September 14 letter attempted to shift the blame for the problems identified in the April Examination from its own previous operating difficulties to future requirements emanating from FIRREA, that letter did not establish harm caused by FIRREA's requirements being applied immediately. Pl. App. 56-59. Rather, the September 14 letter

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[10] The July 31, 1989 letter was written nine days before FIRREA was enacted.

acknowledges that any classification of it as troubled based on FIRREA would be "premature." Id. at 56. In its September 14, 1989 letter, Charter stated "We concede that responding to the new tangible capital requirements established by FIRREA "will be a significant challenge . . . . We are currently in compliance." Pl. App. 57 (emphasis added).

Numerous Government documents also demonstrate that FIRREA was not yet being applied to Plaintiff as of either July 31 or September 14, 1989:

- An internal FHLBB memorandum dated August 21, 1989, noted that 'Charter may fail its minimum capital requirement by January 1, 1990,' and that:

- Frank J. Mola, President of the holding company parent, and Chairman of the Board, has indicated that he is aware of the imminent regulatory changes which will require Charter to have 1.5 percent tangible capital and will make the necessary cash infusion once the regulation has taken effect.

- An internal FHLBB memorandum dated October 23, 1989 stated:

> [Supervisory Agent Sharkey] pointed out [Charter's] current

> tangible capital is a deficit of $4.3 million; they need tangible capital of $5.7 million by December 7, 1989.
>
> • A letter from the OTS to Charter dated November 9, 1989 stated: On November 7, the Office of Thrift Supervision issued new regulations governing the minimum capital standards that will apply to the thrift industry, effective December 7, 1989.

Pl. App. at 47, 49 and 51 (emphasis added).[11]

As the Federal Circuit recognized in Ariadne, the Government's liability was fixed when it "refused to allow use of the asset as it had promised." Ariadne Financial Services Pty. Ltd. v. United States, 133 F.3d 874, 879 (Fed. Cir. 1998). It is clear that the RB3a restrictions as well as the July 31, 1989 letter designating Charter as troubled and imposing restrictions flowing from that designation did not operate to fix Defendant's alleged liability for "deliberately repudiating its promise to allow MDC and Charter to include supervisory goodwill as

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[11] In addition, a FDIC report of examination completed after FIRREA was enacted stated that "[Charter] is operating with insufficient capital and failed its minimum capital requirements on December 7, 1989." Pl. App. at 54 (emphasis added).

regulatory capital." Compl. ¶ 38. Rather, the alleged breach claim did not accrue until December 7, 1989, when FIRREA was first applied to Charter and Charter could no longer count goodwill toward regulatory capital.

Was There A Contract?

Summary Judgment Standard

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). In making a determination as to whether summary judgment is appropriate, a court does not weigh the evidence to determine the truth of the matter, but rather assesses whether there is a genuine issue for trial. Id. at 249. The movant bears the initial burden of establishing the absence of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-movant then bears the burden of showing sufficient evidence of a material fact in dispute that would allow a fact finder to decide the case in its favor. Liberty Lobby, 477 U.S. at 256. If such evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Liberty Lobby, 477 U.S. at 249-50. When considering the existence of a genuine issue of material fact, a court must draw all inferences in a light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). When considering cross-motions for summary judgment, courts evaluate each motion on its own merits and resolve any

reasonable inferences against the moving party. Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). If genuine disputes exist over material facts, both motions must be denied. Id.

Courts must act with caution in granting summary judgment, because though it is a useful procedural tool to speed the determination of disputes in which no questions of material fact exist, an erroneous grant of summary judgment may deny a party its chance to prove its case at trial. D.L. Auld Co. v. Chroma Graphics Corp., 714 F.2d 1144, 1146-47 (Fed. Cir. 1983). Likewise, an "improvident denial" of summary judgment may force the parties and the court to bear the expense of an unnecessary trial. Id.

Contract Formation Principles

In cases in which the Government contracts as a commercial party, courts are to apply "ordinary principles of contract construction and breach that would be applicable to any contract action between private parties." Winstar, 518 U.S. at 870-71. To form an agreement binding upon the Government, four elements must be met: (1) mutuality of intent to contract; (2)consideration; (3) lack of ambiguity in offer and acceptance; and (4) a government representative having actual authority to bind the United States in contract. D&N Bank v. United States, 331 F.3d 1374, 1378 (Fed. Cir. 2003); see Anderson v. United States, 344 F.3d 1343, 1353 (Fed. Cir. 2003); Total Med. Mgmt., Inc. v. United States, 104 F.3d 1314, 1319 (Fed. Cir. 1997).

As Senior Judge Smith observed in Cal. Fed. Bank v. United States, 39 Fed. Cl. 753, 773 (1997) ("CalFed I"), aff'd, 245 F.3d 1342 (Fed. Cir. 2001), cert. denied, 534 U.S. 1113 (2002), "[c]ontracts are not technical documents requiring forms. Rather, they are legal relationships imposed by the law on parties when certain functional prerequisites like intent, offer, acceptance, and consideration occur in logical sequence. Thus, "[r]egulatory documents can be construed as contractual commitments where the reality of the transaction supports such a construction." Fifth Third Bank of W. Ohio v. United States, 52 Fed. Cl. 264, 274 (2002) ("Fifth Third I"). However, Plaintiff has the burden of proving that "the reality of the transaction favors construing such documents as contractual undertakings, as opposed to regulatory statements." Id. at 274-75.

Mutuality of Intent to Contract - Lack of Ambiguity in Offer and Acceptance

Unambiguous mutuality of intent to contract is a precondition for contract formation. Anderson, 344 F.3d at 1353; Fifth Third I, 52 Fed. Cl. at 270. In order to show that mutual intent existed, a plaintiff must provide objective evidence of an offer and a reciprocal acceptance. Anderson, 344 F.3d at 1353.

An offer is "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Id.; Linear Tech. Corp. v. Micrel, Inc., 275 F.3d 1040, 1050 (Fed. Cir. 2001) (quoting Restatement (Second) of contracts § 24); Franklin Sav. Corp. v. United States, 56 Fed. Cl. 720, 742-43 (2003). "For a contract to be

formed once an offer is made, there must be an acceptance, i.e., a 'manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.'" Anderson, 344 F.3d at 1355 (quoting Restatement § 50(1)).

It is well established that "[a]n agency's performance of its regulatory or sovereign functions does not create contractual obligations." D&N Bank v. United States, 331 F.3d at 1378-79; see Fifth Third Bank of Western Ohio v. United States, 402 F.3d 1221, 1234 (Fed. Cir. 2005) ("[the] mere approval of a merger by FHLBB, acting solely in its regulatory capacity, did not create contractual obligations"). In D&N Bank, the Federal Circuit held that in the Winstar context, "something more" than mere regulatory approval of the merger was necessary to support a finding that the Government accepted an offer and entered into a contractually binding agreement. In Anderson, the Federal Circuit illuminated what "something more" might be, stating that it "must be, according to our precedent, a 'manifest assent to the same bargain proposed by the offer.'" 344 F.3d at 1356 (quoting Restatement (Second) of Contracts § 50 cmt. a.).

Here, there was no offer requesting the regulators to permit MDC to continue to count supervisory goodwill toward capital in the face of potential regulatory change. Nor was there a request by MDC to amortize goodwill over an extended period. In Southtrust of Georgia, Inc. v. United States, the court held that because "the plaintiffs sought only the use of goodwill that the then-existing regulatory scheme allowed and did not seek

or secure any protection for use of that goodwill for any period of years," a contract had not been formed. 54 Fed. Cl. 741, 746-47 (2002) (citing Cal. Fed., 245 F.3d at 1347). This is precisely the situation here.

In its application, Plaintiff did not seek any favorable accounting treatment of goodwill beyond that allowed by the then-existing regulations. Plaintiff's merger application requested only that the transaction be characterized as "supervisory." Neither the application nor any negotiations requested either an extended amortization of goodwill beyond that permitted by GAAP or an agreement that the current regulatory allowance for goodwill accounting would continue in the face of regulatory change. The application stated that MDC intended to account for the merger as a "purchase transaction under generally accepted accounting principles" then in effect, and to amortize any resulting goodwill over a period of no greater than 25 years. Pl. App. 12.

Moreover, the context in which MDC acquired Merit is telling. Unlike many Winstar scenarios, it was Plaintiff, not the Government, which initiated the acquisition of the failing thrift. Having once turned around a failing thrift -- Orange Coast Savings, which became Charter -- MDC hired Kaplan Smith to assist in targeting a thrift for another acquisition. Smith Kaplan identified Merit -- all without involvement of the regulators. MDC sent a letter of intent to Merit's Board, and MDC and Merit entered into an agreement and Plan of Merger under which MDC agreed to purchase all of Merit's shares for $1,000,756.20. Subsequently, MDC met

with the regulators to discuss the merger, and the minutes reflect that MDC expected to benefit from the economics of a larger institution and wanted to "start things" before the application was approved. Against this backdrop, MDC submitted its Application for Merger to the FHLBB as required by the Savings and Loan Holding Company Act. There was no inducement from the regulators urging MDC to effect Charter's acquisition of Merit. Rather, MDC sought regulatory approval to have Charter acquire Merit and did not insist on the typical indicia of a Winstar contract -- such as the agreed-upon continued treatment of goodwill as regulatory capital and extended amortization. Moreover, the FHLBB granted Plaintiff less that it asked for and insisted on an additional infusion of actual capital before approving the merger.

Plaintiff contends that the classification of the merger as "supervisory" suffices to prove the Government's intent to contract. See Pl. Reply 13. However, simply labeling the merger as supervisory and allowing Plaintiff to use the purchase method of accounting does not prove the Government's intent to contract. In D&N Bank, the Federal Circuit held that no contract existed even when a merger had been labeled supervisory and the purchase method of accounting had been used. D&N Bank, 331 F.3d at 1379-80, (labeling of a merger as supervisory "would tell us nothing about the Government's intent to contract"); see also Palfed, Inc. v. United States, 61 Fed. Cl. 467, 468 (2004) (classifying a thrift merger as "supervisory" fails to demonstrate that the regulators intended to enter into a contract).

Similarly, in Anderson v. United States, the court found that the mere fact that a merger was "supervisory" and allowed for the use of goodwill as capital did not establish that a contract had been formed. 344 F.3d at 1356. In Anderson, the plaintiff in its application for supervisory conversion requested certain forbearances and use of the purchase method of accounting to amortize goodwill over a period of 40 years. Id. at 1347. However, during its subsequent negotiations, the plaintiff modified its offer by relenting on its demand for extended amortization of goodwill, and the FHLBB approved the application without mention of any forbearance or goodwill amortization. Id. at 1348. In Anderson, the Federal Circuit determined that "the crucial governmental promise" in Winstar cases is the "extended amortization of goodwill." 344 F.3d at 1359. There, as here, that crucial promise was missing.

Plaintiff argues that a contract was formed because MDC requested supervisory goodwill pursuant to the Government's policies and procedures in Memorandum SP-37a which authorized the grant of an SM-2 forbearance. In general, an SM-2 forbearance allowed for deviation from GAAP and FASB 72 in the amortization of intangible assets such as goodwill. Sterling Savings v. United States, 57 Fed. Cl. 445, 448-49 (2003); see also, Coast Fed. Bank v. United States, 48 Fed. Cl. 402, 422 (2000), aff'd, 323 F.3d 1035 (Fed. Cir. 2003) (en banc) ("SM-2 changes the amortization period for the goodwill from the FASB 72 requirement"). The stated purpose of Memorandum SP-37a was to "[e]xpedite the processing of supervisory or assisted

mergers and acquisitions and to diminish the inordinate amount of staff time presently necessitated to negotiate the terms of forbearance letters with potential acquirers of institutions. . . ." Pl. App. 71. Memorandum SP-37a established three categories of potential forbearances: (i) standard forbearances that will be granted; (ii) forbearances that may be granted on a case-by-case basis if circumstances so justify; and (iii) forbearances that will not be granted. Pl. App. 72. Plaintiff contends it requested supervisory goodwill under the second category -- forbearances that may be granted on a case-by-case basis. See Pl. App. at 73.

The record establishes that Plaintiff did not request an SM-2 forbearance. This forbearance is not mentioned in Plaintiff's application or any of the documents concerning the acquisition. Rather, Plaintiff's application states:

> If the fair value of the liabilities assumed exceeds the fair value of the tangible and identifiable assets acquired (FASB No. 72 goodwill), that amount would be amortized to expense over a period no greater than the estimated remaining life of the long-term interest-bearing assets' acquired. Amortization shall follow the guidance set forth in paragraph 5 of FASB No. 72.

Pl. App. 12 (emphasis added). Plaintiff only sought to amortize the goodwill according to GAAP and FASB, and this is all the regulators granted, not the

extended amortization provided by the SM-2 forbearance.[12]

Plaintiff further contends that the negotiations leading up to the merger evince the Government's intent to contract. Tr. at 73. Plaintiff cites its back-and-forth correspondence with the regulators and FHLBB memoranda as evidence of the Government's intent to contract. However, the correspondence and memoranda do not mention continued use of goodwill in the face of regulatory change or extended amortization -- the crucial elements of a Winstar contract.

Finally, Plaintiff contends that the June 24, 1988 letter approving MDC's H-(e)3 Merger Application exhibited the Government's approval for the continuing use of goodwill because the Government knew that absent the use of goodwill the institution would have been insolvent immediately upon completion of the merger. According to the letter, without an additional capital

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[12] Further, as described in Memorandum SP-37a, an SM-2 forbearance would be reflected in forbearance letters containing the following language:

> For purposes of reporting to the Board, the value of any unidentifiable intangible assets resulting from accounting for the merger in accordance with the purchase method may be amortized by (resulting institution) over a period not to exceed ( ) years by the straight line method.

Pl. App. 74. Thus, Memorandum SP-37a assumed the use of forbearance letters in describing the grant of an SM-2 forbearance, and no forbearance letters were issued here.

contribution, the regulatory capital of the resulting institution would be only $10.9 million, or approximately 2% of liabilities. Pl. App. 60. In D&N Bank, the Federal Circuit rejected a similar argument and held that the FHLBB's approval of the merger alone "does not amount to intent to contract" even in light of testimony that it "made no sense for D&N to merge without a contract committing the Bank Board to allow D&N to count goodwill as an element of regulatory capital." 331 F.3d at 1378-79. The Court further noted that:

> D&N's arguments that it would have been 'irrational' or 'mad' for D&N to have acquired First Federal without insuring the right to treat goodwill as regulatory capital [would not] permit us to ignore the lack of proof of elements required to show the existence of a contract. Even if D&N would have been instantly insolvent and out of regulatory compliance were it not allowed to treat goodwill as regulatory capital, that fact tells us nothing about the government's intent [to contract].

D&N, 331 F.3d at 1380. Similarly, here, even if it would have made no sense for MDC to merge without a contract protecting its continued use of goodwill, the FHLBB's approval of such a merger alone does not demonstrate that a contract formed.

In sum, Plaintiff did not request and was not granted any forbearances which give rise to a contract in the Winstar setting. There is nothing in

MDC's application or the history of negotiations asking for extended amortization of goodwill or the continued ability to count goodwill as capital in the face of regulatory change. The alleged negotiations and documents cited by Plaintiff show nothing more than regulatory approval of an acquisition. While the regulators did approve using goodwill as capital consistent with then existing regulations, they did not promise to permit MDC to continue this accounting in the face of regulatory change. As such, Plaintiff has failed to show the "something more" necessary to remove the transaction from the realm of regulatory approval.[13]

The Fifth Amendment Claims

Plaintiff alleges the passage of FIRREA and subsequent seizure of Charter for non-compliance with capital adequacy requirements amounts to a taking and a denial of due process in violation of the Fifth Amendment of the Constitution. In accordance with Federal Circuit precedent, both of Plaintiff's Fifth Amendment claims are dismissed.

In Castle v. United States, the Federal Circuit held that the enactment of FIRREA did not constitute an unconstitutional taking because the plaintiffs "retained the full range of remedies associated with any contractual property right they possessed." Castle v. United States, 301 F.3d 1328,

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[13] Defendant also argued that even if there was a contract, MDC was not a party to the contract because it was a shareholder of its thrift subsidiary and shareholder plaintiffs are neither direct parties nor third-party beneficiaries of such contracts. Because the Court concluded that there was no contract, it is unnecessary for the Court to reach this issue.

1342 (Fed. Cir. 2002); see also Bailey v. United States, 341 F.3d 1342, 1346-47 (Fed. Cir. 2003); First Fed. Sav. and Loan Ass'n of Rochester v. United States, 58 Fed. Cl. 139, 166-67 (2003). After the Castle opinion was issued, this Court has routinely dismissed all Winstar-related takings claims. E.g., AG Route Seven Partnership v. United States, 57 Fed. Cl. 521, 535 (2003) ("case law is clear that Fifth Amendment taking claims are inapposite with contract claims when the government is a mere party to a contract and not acting as a sovereign . . . . "); First Fed. Sav. Bank of Hegewisch v. United States, 57 Fed. Cl. 316, 318-19 (2003) (finding Castle to be dispositive and dismissing plaintiff's takings claim); National Australia Bank v. United States, 55 Fed. Cl. 782, 789 (2003) (a takings claim is "conceptually foreclosed" by the finding of a breach of contract); Granite Mgmt. Corp. v. United States, 55 Fed. Cl. 164, 167 (2003) (holding that the plaintiff's "cause of action therefore is in contract, not takings law" and dismissing takings claim following an order to show cause).

Further, it is well-established that there is no jurisdiction under the Tucker Act over a Due Process claim "unless it constitutes an illegal exaction." Casa de Cambio Comdiv S.A., de C.V. v. United States, 291 F.3d 1356, 1363 (Fed. Cir.2002), cert. denied, 538 U.S. 921 (2003) (citations omitted); Crocker v. United States, 125 F.3d 1475, 1476 (Fed. Cir.1997); AG Seven Partnership v. United States, 57 Fed. Cl. 521, 535 (2003); National Australia Bank, 55 Fed. Cl. at 789.

Conclusion

1. This action was timely filed, therefore, Defendant's Renewed Motion to Dismiss is **DENIED**.

2. Plaintiff's Cross Motion for Summary Judgment on Liability is **DENIED**, and Defendant's Motion for Summary Judgment on Liability is **GRANTED**.

3. Plaintiff's Fifth Amendment Takings and Due Process claims are **DISMISSED**.

4. The Clerk is directed to dismiss this action. No Costs.

s/Mary Ellen Coster Williams
MARY ELLEN COSTER WILLIAMS
Judge

[ENTERED: MAY 5, 2008]

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-5058, -5080

MOLA DEVELOPMENT CORPORATION,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Cross Appellant.

Appeal from the United States Court of Federal Claims in 95-CV-790, Judge Mary Ellen Coster Williams.

ORDER

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A petition for rehearing en banc having been filed by the Appellant, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on May 12, 2008.

Circuit Judge Newman would rehear the appeal en banc.

FOR THE COURT,
s/ Jan Horbaly/JB
Jan Horbaly
Clerk

Dated: 05/05/2008
cc: Paul R. Franke, III
Jeanne E. Davidson

FILED
U.S. COURT OF
APPEALS FOR
THE FEDERAL
CIRCUIT

MOLA DEVELOPMENT
V US, 2007-5058,-5080
(CFC - 95-CV-790)

MAY 05 2008

JAN HORBALY
CLERK

United States Code Annotated
Title 12. Banks and Banking
Chapter 12. Savings Associations
§ 1464. Federal savings associations

(t) Capital standards

(1) In general

(A) Requirement for standards to be prescribed

The Director shall, by regulation, prescribe and maintain uniformly applicable capital standards for savings associations. Those standards shall include—

(i) a leverage limit;

(ii) a tangible capital requirement; and

(iii) a risk-based capital requirement.

(B) Compliance

A savings association is not in compliance with capital standards for purposes of this subsection unless it complies with all capital standards prescribed under this paragraph.

(C) Stringency

The standards prescribed under this paragraph shall be no less stringent than the capital standards applicable to national banks.

(D) Deadline for regulations

The Director shall promulgate final regulations under this paragraph not later than 90 days after August 9, 1989, and those regulations shall become effective not later than 120 days after August 9, 1989.

(2) Content of standards

(A) Leverage limit

The leverage limit prescribed under paragraph (1) shall require a savings association to maintain core capital in an amount not less than 3 percent of the savings association's total assets.

(B) Tangible capital requirement

The tangible capital requirement prescribed under paragraph (1) shall require a savings association to maintain tangible capital in an amount not less than 1.5 percent of the savings association's total assets.

(C) Risk-based capital requirement

Notwithstanding paragraph (1)(C), the risk-based capital requirement prescribed under paragraph (1) may deviate from the risk-based capital standards applicable to national banks to reflect interest-rate risk or other risks, but such deviations shall not, in the aggregate, result in materially lower levels of capital being required of savings associations under the risk-based capital requirement than would be required under the risk-based capital standards applicable to national banks.

(3) Transition rule

(A) Certain qualifying supervisory goodwill included in calculating core capital

Notwithstanding paragraph (9)(A), an eligible savings association may include qualifying supervisory goodwill in calculating core capital. The amount of qualifying supervisory goodwill that may be included may not exceed the applicable percentage of total assets set forth in the following table:

For the following period:	**The applicable percentage is:**
Prior to January1, 1992	1.500 percent
January 1, 1992-December 31, 1992	1.000 percent
January 1, 1993-December 31, 1993	0.750 percent
January 1, 1994-December 31, 1994	0.375 percent
Thereafter	0 percent

(B) Eligible savings associations

For purposes of subparagraph (A), a savings association is an eligible savings association so long as the Director determines that—

(i) the savings association's management is competent;

(ii) the savings association is in substantial compliance with all applicable statutes, regulations, orders, and supervisory agreements and directives; and

(iii) the savings association's management has not engaged in insider dealing, speculative practices, or any other activities that have jeopardized the association's safety and soundness or contributed to impairing the association's capital.

(4) [Repealed. Pub. L. 109-351, Title IV, § 402(1), Oct. 13, 2006, 120 Stat. 1974].

(5) Separate capitalization required for certain subsidiaries

(A) In general

In determining compliance with capital standards prescribed under paragraph (1), all of a savings association's investments in and extensions of credit to any subsidiary engaged in activities not permissible for a national bank

shall be deducted from the savings association's capital.

(B) Exception for agency activities

Subparagraph (A) shall not apply with respect to a subsidiary engaged, solely as agent for its customers, in activities not permissible for a national bank unless the Corporation, in its sole discretion, determines that, in the interests of safety and soundness, this subparagraph should cease to apply to that subsidiary.

(C) Other exceptions

Subparagraph (A) shall not apply with respect to any of the following:

(i) Mortgage banking subsidiaries

A savings association's investments in and extensions of credit to a subsidiary engaged solely in mortgage-banking activities.

(ii) Subsidiary insured depository institutions

A savings association's investments in and extensions of credit to a subsidiary—

(I) that is itself an insured depository institution or a company the sole investment of which is an insured depository institution, and

(II) that was acquired by the parent insured depository institution prior to May 1, 1989.

(iii) Certain Federal savings banks

Any Federal savings association existing as a Federal savings association on August 9, 1989

(I) that was chartered prior to October 15, 1982, as a savings bank or a cooperative bank under State law; or

(II) that acquired its principal assets from an association that was chartered prior to October 15, 1982, as a savings bank or a cooperative bank under State law.

(D) Transition rule

(i) Inclusion in capital

Notwithstanding subparagraph (A), if a savings association's subsidiary was, as of April 12, 1989, engaged in activities not permissible for a national bank, the savings association may include in calculating capital the applicable percentage (set forth in clause (ii)) of the lesser of—

(I) the savings association's investments in and extensions of credit to the subsidiary on April 12, 1989; or

(II) the savings association's investments in and extensions of credit to the subsidiary on the date as of which the savings association's capital is being determined.

(ii) Applicable percentage

For purposes of clause (i), the applicable percentage is as follows:

For the following period:	The applicable percentage is:
Prior to July 1, 1990	100 percent
July 1, 2990-June 30, 1991	90 percent
July 1, 1991-October 31, 1992	75 percent
November 1, 1992-June 30, 1993	60 percent
July 1, 1993-June 30, 1994	40 percent
Thereafter	0 percent

(iii) Agency discretion to prescribe greater percentage

Subject to clauses (iv), (v), and (vi), the Director may prescribe by order, with respect to a particular qualified savings association, an applicable percentage greater than that provided in clause (ii) if the Director determines, in the Director's sole discretion, that the use of the greater percentage, under the circumstances—

(I) would not constitute an unsafe or unsound practice;

(II) would not increase the risk to the Deposit Insurance Fund; and

(III) would not be likely to result in the association's being in an unsafe or unsound condition.

(iv) Substantial compliance with approved capital plan

In the case of a savings association which is subject to a plan submitted under paragraph (7)(D) of this subsection or an order issued under this subsection, a directive issued or plan approved under subsection (s) of this section, or a capital restoration plan approved or order issued under section 38 or 39 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1831o, 1831p-1], an order issued under clause (iii) with respect to the association shall be effective only so long as the association is in substantial compliance with such plan, directive, or order.

(v) Limitation on investments taken into account

In prescribing the amount by which an applicable percentage under clause (iii) may exceed the applicable percentage under clause (ii) with respect to a particular qualified savings association, the Director may take into account only the sum of—

(I) the association's investments in, and extensions of credit to, the subsidiary that were made on or before April 12, 1989; and

(II) the association's investments in, and extensions of credit to, the subsidiary that were made after April 12, 1989, and were necessary to complete projects initiated before April 12, 1989.

(vi) Limit

The applicable percentage limit allowed by the Director in an order under clause (iii) shall not exceed the following limits:

For the following period:	The limit is:
Prior to July 1, 1994	75 percent
July 1, 1994 through June 30, 1995	60 percent
July 1, 1995 through June 30, 2996	40 percent
After June 30, 1996	0 percent

(vii) Critically undercapitalized institution

In the case of a savings association that becomes critically undercapitalized (as defined in section 38 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1831o]) as determined under

this subparagraph without applying clause (iii), clauses (iii) through (v) shall be applied by substituting "Corporation" for "Director" each place such term appears.

(viii) "Qualified savings association" defined

For purposes of clause (iii), the term "qualified savings association" means an eligible savings association (as defined in paragraph (3)(B)) which is subject to this paragraph solely because of the real estate investments or other real estate activities of the association's subsidiary, and--

(I) is adequately capitalized (as defined in section 38 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1831o]); or

(II) is in compliance with an approved capital restoration plan meeting the requirements of section 38 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1831o], and is not critically undercapitalized (as defined in such section).

(ix) FDIC's discretion to prescribe lesser percentage

The Corporation may prescribe by order, with respect to a particular savings association, an applicable percentage less than that provided in clause (ii) or prescribed under clause (iii) if the Corporation determines, in its sole discretion, that the use of a greater percentage would, under the circumstances, constitute an unsafe

or unsound practice or be likely to result in the association's being in an unsafe or unsound condition.

(E) Consolidation of subsidiaries not separately capitalized

In determining compliance with capital standards prescribed under paragraph (1), the assets and liabilities of each of a savings association's subsidiaries (other than any subsidiary described in subparagraph (C)(ii)) shall be consolidated with the savings association's assets and liabilities, unless all of the savings association's investments in and extensions of credit to the subsidiary are deducted from the savings association's capital pursuant to subparagraph (A).

(6) Consequences of failing to comply with capital standards

(A) Prior to January 1, 1991

Prior to January 1, 1991, the Director--

(i) may restrict the asset growth of any savings association not in compliance with capital standards; and

(ii) shall, beginning 60 days following the promulgation of final regulations under this subsection, require any savings association not in compliance with capital standards to submit

a plan under subsection (s)(4)(A) of this section that--

(I) addresses the savings association's need for increased capital;

(II) describes the manner in which the savings association will increase its capital so as to achieve compliance with capital standards;

(III) specifies the types and levels of activities in which the savings association will engage;

(IV) requires any increase in assets to be accompanied by an increase in tangible capital not less in percentage amount than the leverage limit then applicable;

(V) requires any increase in assets to be accompanied by an increase in capital not less in percentage amount than required under the risk-based capital standard then applicable; and

(VI) is acceptable to the Director.

(B) On or after January 1, 1991

On or after January 1, 1991, the Director--

(i) shall prohibit any asset growth by any savings association not in compliance with capital standards, except as provided in subparagraph (C); and

(ii) shall require any savings association not in compliance with capital standards to comply with a capital directive issued by the Director (which may include such restrictions, including restrictions on the payment of dividends and on compensation, as the Director determines to be appropriate).

(C) Limited growth exception

The Director may permit any savings association that is subject to subparagraph (B) to increase its assets in an amount not exceeding the amount of net interest credited to the savings association's deposit liabilities if--

(i) the savings association obtains the Director's prior approval;

(ii) any increase in assets is accompanied by an increase in tangible capital in an amount not less than 6 percent of the increase in assets (or, in the Director's discretion if the leverage limit then applicable is less than 6 percent, in an amount equal to the increase in assets multiplied by the percentage amount of the leverage limit);

(iii) any increase in assets is accompanied by an increase in capital not less in percentage amount than required under the risk-based capital standard then applicable;

(iv) any increase in assets is invested in low-risk assets, such as first mortgage loans secured

by 1- to 4-family residences and fully secured consumer loans; and

(v) the savings association's ratio of core capital to total assets is not less than the ratio existing on January 1, 1991.

(D) Additional restrictions in case of excessive risks or rates

The Director may restrict the asset growth of any savings association that the Director determines is taking excessive risks or paying excessive rates for deposits.

(E) Failure to comply with plan, regulation, or order

The Director shall treat as an unsafe and unsound practice any material failure by a savings association to comply with any plan, regulation, or order under this paragraph.

(F) Effect on other regulatory authority

This paragraph does not limit any authority of the Director under other provisions of law.

(7) Exemption from certain sanctions

(A) Application for exemption

Any savings association not in compliance with the capital standards prescribed under paragraph (1) may apply to the Director for an exemption

from any applicable sanction or penalty for noncompliance which the Director may impose under this chapter.

(B) Effect of grant of exemption

If the Director approves any savings association's application under subparagraph (A), the only sanction or penalty to be imposed by the Director under this chapter for the savings association's failure to comply with the capital standards prescribed under paragraph (1) is the growth limitation contained in paragraph (6)(B) or paragraph (6)(C), whichever is applicable.

(C) Standards for approval or disapproval

(i) Approval

The Director may approve an application for an exemption if the Director determines that--

(I) such exemption would pose no significant risk to the Deposit Insurance Fund;

(II) the savings association's management is competent;

(III) the savings association is in substantial compliance with all applicable statutes, regulations, orders, and supervisory agreements and directives; and

(IV) the savings association's management has not engaged in insider dealing,

speculative practices, or any other activities that have jeopardized the association's safety and soundness or contributed to impairing the association's capital.

(ii) Denial or revocation of approval

The Director shall deny any application submitted under clause (i) and revoke any prior approval granted with respect to any such application if the Director determines that the association's failure to meet any capital standards prescribed under paragraph (1) is accompanied by--

(I) a pattern of consistent losses;

(II) substantial dissipation of assets;

(III) evidence of imprudent management or business behavior;

(IV) a material violation of any Federal law, any law of any State to which such association is subject, or any applicable regulation; or

(V) any other unsafe or unsound condition or activity, other than the failure to meet such capital standards.

(D) Submission of plan required

Any application submitted under subparagraph (A) shall be accompanied by a plan which--

(i) meets the requirements of paragraph (6)(A)(ii); and

(ii) is acceptable to the Director.

(E) Failure to comply with plan

The Director shall treat as an unsafe and unsound practice any material failure by any savings association which has been granted an exemption under this paragraph to comply with the provisions of any plan submitted by such association under subparagraph (D).

(F) Exemption not available with respect to unsafe or unsound practices

This paragraph does not limit any authority of the Director under any other provision of law, including section 8 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1818], to take any appropriate action with respect to any unsafe or unsound practice or condition of any savings association, other than the failure of such savings association to comply with the capital standards prescribed under paragraph (1).

(8) Temporary authority to make exceptions for eligible savings associations

(A) In general

Notwithstanding paragraph (1)(C), the Director may, by order, make exceptions to the capital standards prescribed under paragraph (1) for

eligible savings associations. No exception under this paragraph shall be effective after January 1, 1991.

(B) Standards for approval or disapproval

In determining whether to grant an exception under subparagraph (A), the Director shall apply the same standards as apply to determinations under paragraph (7)(C).

(9) Definitions

For purposes of this subsection--

(A) Core capital

Unless the Director prescribes a more stringent definition, the term "core capital" means core capital as defined by the Comptroller of the Currency for national banks, less any unidentifiable intangible assets.

(B) Qualifying supervisory goodwill

The term "qualifying supervisory goodwill" means supervisory goodwill existing on April 12, 1989, amortized on a straightline basis over the shorter of--

(i) 20 years, or

(ii) the remaining period for amortization in effect on April 12, 1989.

(C) Tangible capital

The term "tangible capital" means core capital minus any intangible assets (as intangible assets are defined by the Comptroller of the Currency for national banks).

(D) Total assets

The term "total assets" means total assets (as total assets are defined by the Comptroller of the Currency for national banks) adjusted in the same manner as total assets would be adjusted in determining compliance with the leverage limit applicable to national banks if the savings association were a national bank.

(10) Use of comptroller's definitions

(A) In general

The standards prescribed under paragraph (1) shall include all relevant substantive definitions established by the Comptroller of the Currency for national banks.

(B) Special rule

If the Comptroller of the Currency has not made effective regulations defining core capital or establishing a risk-based capital standard, the Director shall use the definition and standard contained in the Comptroller's most recently published final regulations.

Supreme Court, U.S.
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No. 08-138

In the Supreme Court of the United States

MOLA DEVELOPMENT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioner owned a controlling interest in a savings and loan that was allowed to merge with another institution in 1988. The regulatory approval of the merger contained no provision or forbearance regarding treatment of goodwill. The question presented is as follows:

Whether the government's approval of the proposed merger resulted in the formation of a contract between the United States and petitioner regarding the future regulatory treatment of goodwill with respect to the merged entity.

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In the Supreme Court of the United States

No. 08-138

MOLA DEVELOPMENT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 516 F.3d 1370. The opinion of the Court of Federal Claims (Pet. App. 34a-85a) is reported at 74 Fed. Cl. 528.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2008. A petition for rehearing was denied on May 5, 2008 (Pet. App. 86a-88a). The petition for a writ of certiorari was filed on August 1, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is one of the breach-of-contract cases that were filed after the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989

(FIRREA), Pub. L. No. 101-73, 103 Stat. 183. See *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996) (*Winstar*). Of the approximately 122 *Winstar*-related cases that were originally filed, approximately 15 remain pending. Most of those cases, like this one, have nearly completed the litigation process.

1. In 1984, petitioner entered the financial services business by acquiring a financially troubled California savings and loan, which it renamed Charter Savings Bank (Charter). After that acquisition, petitioner hired consultants to find another troubled financial institution for it to acquire and merge into Charter. Pet. App. 2a-3a, 38a-39a.

In November 1987, petitioner's consultants selected Merit Savings Bank (Merit) as a merger target. On December 15, 1987, the Federal Home Loan Bank Board (FHLBB) proposed that Merit be placed on a bidding schedule for sale in June 1988. In late December 1987, petitioner and Charter informed Merit of their interest in merging Merit into Charter. Petitioner notified the government about the proposed transaction the next day. On January 15, 1988, petitioner and Merit entered into a formal agreement regarding the terms of a merger between Charter and Merit. The government was not a party to that agreement. Pet. App. 3a-4a, 38a-39a.

On January 28, 1988—13 days after reaching a merger agreement with Merit—petitioner approached the FHLBB to discuss the terms for regulatory approval of the proposed merger. During those discussions, petitioner asked the government to allow it to make a non-cash contribution in order to bring the merged entity into compliance with capital requirements. FHLBB officials denied that request and stated their opposition to

permitting petitioner to fund the merged entity through a non-cash contribution. Pet. App. 4a, 39a-40a.

On April 19, 1988, petitioner and Charter filed a formal application for regulatory approval of the proposed merger. The application described the planned use of the purchase method of accounting and the amortization of any resulting goodwill over a period not to exceed 25 years. Those provisions were consistent with Generally Accepted Accounting Principles and standard FHLBB policy at the time, and thus required no regulatory forbearance. The merger application also requested six specific regulatory forbearances, none of which concerned the regulatory treatment of goodwill. Pet. App. 4a.

Discussions between petitioner and the government continued following the filing of the April 19, 1988, merger application. On May 20, 1998, FHLBB officials informed petitioner that they would not grant any of the requested forbearances and that the merger would be approved only if petitioner made a cash contribution that was sufficient to meet the regulatory minimum capital levels. On May 24, 1988, petitioner asked the FHLBB to designate the merger as "supervisory" in order to facilitate "use of net operating losses for tax purposes." Pet. App. 5a (citation omitted).

On June 24, 1988, the FHLBB granted preliminary approval to the Charter/Merit merger. As petitioner had requested, the government classified the merger as "supervisory." The approval letter said nothing about the regulatory treatment of goodwill. The only regulatory forbearance mentioned in the approval letter stated that "the calculation for the cash contribution shall exclude scheduled items of Merit as of September 30, 1987." Pet. App. 6a (citation omitted). That forbearance

allowed petitioner to exclude certain of Merit's problem loans in calculating the required cash contribution. *Id.* at 5a-6a.

The merger between Charter and Merit closed on July 29, 1988. The FHLBB did not adopt a formal resolution approving the merger. Pet. App. 5a.

2. In August 1989, Congress enacted FIRREA to address widespread problems in the savings and loan industry. FIRREA created the Office of Thrift Supervision (OTS) and charged it with examining, supervising, and regulating federally insured thrifts. 12 U.S.C. 1462a, 1463. On December 7, 1989, regulations implementing FIRREA became effective. Pet. App. 6a. Charter was not in compliance with the new regulations. *Ibid.* OTS seized the thrift on June 15, 1990, and regulators ultimately liquidated Charter. *Ibid.*

3. Petitioner filed suit in the Court of Federal Claims, alleging that FIRREA's enactment breached a contract between petitioner and the government regarding the regulatory treatment of goodwill. Pet. App. 7a. The court granted summary judgment in favor of the government. *Id.* at 34a-85a. The court determined that "[t]here [was] nothing in [petitioner's] application or the history of negotiations asking for extended amortization of goodwill or the continued ability to count goodwill as capital in the face of regulatory change," and it stated that "[t]he alleged negotiations and documents cited by [petitioner] show nothing more than regulatory approval of an acquisition." *Id.* at 82a-83a. As a result, the court held that petitioner "ha[d] failed to show the 'something more' [that is] necessary to remove the transaction from the realm of regulatory approval." *Id.* at 83a.

4. The court of appeals affirmed. Pet. App. 1a-20a.

a. The court of appeals stated that, "[i]n order to prevail in a *Winstar* case[,] a plaintiff . . . must establish that a contract existed with the government whereby the government was 'contractually bound to recognize the supervisory goodwill and [particular] amortization periods.'" Pet. App. 13a-14a (quoting *Franklin Fed. Sav. Bank* v. *United States*, 431 F.3d 1360, 1365 (Fed. Cir. 2005), and *Winstar* v. *United States*, 64 F.3d 1531, 1541 (Fed. Cir.), aff'd, 518 U.S. 839 (1996)). The court further observed that, in order to demonstrate the existence of a *Winstar* contract, the plaintiff must establish four elements, including "mutuality of intent to contract." *Id.* at 14a (quoting *Anderson* v. *United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003)).

The court of appeals reiterated its previous statements that "a formal written agreement is not necessary to prove the existence of a *Winstar* contract where there is other adequate evidence of the government's intent to form a contract." Pet. App. 15a (citing *Fifth Third Bank* v. *United States*, 402 F.3d 1221, 1231-1232 (Fed. Cir. 2005)). The court emphasized, however, that "[a]n agency's performance of its regulatory or sovereign functions does not create contractual obligations," *id.* at 14a (quoting *D&N Bank* v. *United States*, 331 F.3d 1374, 1378-1379 (Fed. Cir. 2003)), and that "[m]ere approval of the merger does not amount to [an] intent to contract." *Ibid.* (quoting *Anderson*, 344 F.3d at 1353, and *D&N Bank*, 331 F.3d at 1378). The court of appeals explained that, in order for a plaintiff to demonstrate the existence of a *Winstar* contract, "there must . . . be a clear indication of intent to contract" and the plaintiff must raise "more than a cloud of evidence that could be consistent with a contract." *Ibid.* (quoting *D&N Bank*, 331 F.3d at 1377-1378).

In this case, the court of appeals determined that there was "no evidence of any negotiation about the regulatory treatment of goodwill that could serve as evidence that the government agreed to a goodwill contract." Pet. App. 15a; see *id.* at 6a (observing that "[n]o document purports to be a written agreement between the FHLBB and either [petitioner] or Charter"). The court rejected petitioner's contention "that its negotiations for the FHLBB's designation of the merger as 'supervisory' is sufficient evidence of the government's intent to form a contract with respect to regulatory treatment of goodwill." *Id.* at 15a. The court explained that it had "rejected a similar argument in *D&N Bank*," and had stated that "labeling a merger 'supervisory' alone, . . . tell[s] us nothing about the government's intent to contract." *Id.* at 15a-16a (quoting *D&N Bank*, 331 F.3d at 1380) (brackets in original).

The court of appeals also rejected petitioner's contention "that the negotiation over the supervisory designation" in this particular case "was in effect a negotiation over the treatment of goodwill." Pet. App. 16a. The basis of that argument was petitioner's claim that a "supervisory" "designation was necessary, under the prevailing regulations, to allow use of the purchase method of accounting," which was, in turn, "the only accounting method that would recognize goodwill as an asset for regulatory purposes." *Ibid.* The court of appeals "disagree[d] with [petitioner's] construction of the regulations," *ibid.*, concluding that neither the regulations themselves nor an internal FHLBB memorandum supported petitioner's "assertion that the supervisory designation was necessary to utilize the purchase method of accounting." *Id.* at 18a.

Finally, the court of appeals rejected petitioner's argument "that the government must have intended to form a contract with respect to regulatory treatment of goodwill because Charter would not have had sufficient capital to meet regulatory requirements absent the inclusion of goodwill in its regulatory capital calculation." Pet. App. 19a. The court acknowledged that "imminent regulatory noncompliance may help to establish that negotiated forbearances were contractual." *Ibid.* (citing *Fifth Third Bank*, 402 F.3d at 1232). The court of appeals stated, however, that "the mere risk of regulatory noncompliance absent use of the purchase method of accounting does nothing to establish the existence of a goodwill contract." *Ibid.* (citing *D&N Bank*, 331 F.3d at 1380). The court concluded that, "[i]n the absence of other evidence indicating the government's intent to contract," the FHLBB's approval of "a merger that, without the inclusion of goodwill in Charter's regulatory capital calculation, would have left Charter's capital level below the regulatory minimum does not establish any contract to maintain this treatment of goodwill." *Ibid.* The court of appeals therefore declined to "reach the government's contention that [petitioner] lacks standing to assert a *Winstar* breach of contract claim because [petitioner] was not a party to any agreement with the government regarding regulatory treatment of goodwill, even if Charter was a party to such a contract." *Id.* at 19a n.9.

b. Judge Newman dissented in relevant part. Pet. App. 21a-33a. In her view, "[t]he circumstances and documents [in this case] left no doubt that a contract including supervisory goodwill was intended and formed." *Id.* at 22a.

ARGUMENT

The court of appeals correctly held that no contract was formed between petitioner and the government regarding the future regulatory treatment of goodwill with respect to the merged Charter/Merit entity. The court of appeals' decision in this case is consistent with this Court's decision in *Winstar* and does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore unwarranted.

1. No conflict exists between the court of appeals' ruling here and this Court's decision in *Winstar*. As petitioner acknowledges (Pet. 9), "[t]he issue of contract formation was not squarely before this Court in *Winstar*." Accord *Winstar*, 518 U.S. at 860 (opinion of Souter, J.) (stating that "[t]he anterior question whether there were contracts at all between the Government and respondents dealing with regulatory treatment of supervisory goodwill and capital credit * * * is not strictly before us"). And although the issues before the Court in *Winstar* "require[d] some consideration of the nature of the underlying transactions," *id.* at 861, petitioner identifies no language supporting its assertion (Pet. 5) that *Winstar* announced a single "standard" for determining whether a contract was formed in the first instance. There is likewise no basis for petitioner's assertion (*ibid.*) that, under *Winstar*, "regulatory documents papering the transactions [are] to be construed as part of a contractual commitment and not as mere statements of regulatory policy."

In each of the transactions before the Court in *Winstar*, the Federal Savings and Loan Insurance Corporation (FSLIC) and a thrift institution had formally signed a document entitled "Assistance Agreement" or "Supervisory Action Agreement." See 518 U.S. at 861-868

(opinion of Souter, J.). Those documents on their face constituted "agreements" between the government and private parties, and they included standard contractual clauses, such as integration clauses. See *ibid.* The issue before the Court in *Winstar* was not whether contracts had been formed between FSLIC and the thrifts, but whether those contracts contained terms regarding the treatment of supervisory goodwill that subjected the United States to liability when Congress passed a law affecting that treatment. The decision in *Winstar* does not support the proposition, essential to petitioner's claim here, that the mere act of regulatory approval can be regarded as an implicit contractual promise by the government that the existing legal framework will not change. To find a contract on the basis of actions by a federal agency in executing a regulatory law would not only violate ordinary principles of contract formation and administrative law, but would also violate the prohibition under the Tucker Act against recognizing contracts implied in law. See *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980) (per curiam); *United States* v. *Algoma Lumber Co.*, 305 U.S. 415, 421 (1939).

Petitioner is correct that, during the 12 years since *Winstar* was decided, the Federal Circuit has fleshed out the standards for determining whether a *Winstar* contract was formed in a particular case. Petitioner is also correct (Pet. 9) that some of the precise details of the doctrine that the Federal Circuit has developed in this area are not, in a strong sense, "mandate[d]" by this Court's decision in *Winstar*. But that does not mean that those decisions conflict with *Winstar*. It simply means that the Federal Circuit has been required, like any other lower court, to apply the general principles

stated in this Court's decisions to situations that the Court did not specifically address. Cf. Pet. 10 (urging that this Court should "step in and *define* the parameters of a *Winstar* contract for the treatment of supervisory goodwill" (emphasis added)).

2. Petitioner also suggests (Pet. 9) that this Court's review is warranted because the court of appeals' decision in this case conflicts with its own prior decisions. An intra-circuit conflict would not be a reason for this Court to grant a writ of certiorari. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).*

In any event, there is no conflict between prior Federal Circuit decisions and the court of appeals' decision in this case. The court of appeals quoted (see Pet. App. 14a) the same four requirements for the formation of a *Winstar* contract that it had set out in *Anderson* v. *United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003) (see Pet. 18). The court also acknowledged (Pet. App. 15a) that its decision in *Fifth Third Bank* v. *United States*, 402 F.3d 1221, 1234 (Fed. Cir. 2005) (see Pet. 11, 24-25, 30), had established that "a formal written agreement is not necessary to prove the existence of a *Winstar* contract when there is other adequate evidence of the government's intent to form a contract." The court of appeals simply found that, in this case, there was "*no* evidence of *any* negotiations about the regulatory treatment of goodwill that could serve as evidence that the

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* Nor would any "conflict" between the court of appeals' decision in this case and the "Court of Federal Claims' own prior law" (Pet. 9) merit this Court's review. The Federal Circuit has exclusive appellate jurisdiction over the Court of Federal Claims, see 28 U.S.C. 1295(a)(3), and its decisions are binding on that court. See *Crowley* v. *United States*, 398 F.3d 1329, 1335 (Fed. Cir.), cert. denied, 546 U.S. 1031 (2005).

government agreed to a goodwill contract." Pet. App. 15a (emphases added). And petitioner does not even attempt to explain how the court of appeals' decision in this case conflicts with *Hometown Financial, Inc.* v. *United States*, 409 F.3d 1360 (Fed. Cir. 2005) (see Pet. 15-16), *Admiral Financial Corp.* v. *United States*, 678 F.3d 1336 (Fed. Cir. 2004) (see Pet. 16), or the "other" unspecified "precedent of the Federal Circuit" that petitioner invokes. Pet. 30.

3. Petitioner suggests that this Court should grant certiorari because the court of appeals reached the wrong result in this particular case. See *e.g.*, Pet. 10, 12-16, 18-23, 26-30. But the "determination of whether the government has shown assent to a contract guaranteeing a particular treatment of goodwill is a fact-intensive inquiry," *Suess* v. *United States*, 535 F.3d 1348, 1360 (Fed. Cir. 2008), and petitioner's request for case-specific error-correction does not warrant this Court's review.

In any event, the court of appeals correctly concluded that there was no contract regarding the regulatory treatment of goodwill in this case. The court did not require petitioner to demonstrate the existence of any "magic language" (Pet. 9, 19, 30), "key words" (Pet. 23), or a "single integrated contract document" (Pet. 23). Rather, the court of appeals ruled against petitioner because it concluded that there was "*no* evidence of *any* negotiations about the regulatory treatment of goodwill that could serve as evidence that the government agreed to a goodwill contract." Pet. App. 15a (emphases added).

The court of appeals likewise did not rely on any "magic language" test in rejecting petitioner's contention that its negotiations with the FHLBB about treating the merger as "supervisory" was, in effect, a negoti-

ation for a goodwill contract. Instead, the court rejected the underlying premise of petitioner's argument, *i.e.*, that a supervisory designation was "*necessary*, under the prevailing regulations, to allow use of * * * the only accounting method that would recognize goodwill as an asset for regulatory purposes." Pet. App. 16a (emphasis added). Petitioner does not contend that the court of appeals' conclusion on that point was erroneous. Nor does petitioner acknowledge the undisputed evidence—cited by both the Court of Federal Claims (see *id.* at 48a-50a) and the court of appeals (see *id.* at 5a)—that the FHLBB understood petitioner's request for a "supervisory" designation as being for the purpose of permitting the merged entity "to utilize the benefits of a tax free reorganization and the net operating loss carryforwards of Merit." *Id.* at 5a (citation omitted).

Contrary to petitioner's repeated suggestions (Pet. 9, 11), the court of appeals did not hold that there can never be a *Winstar* contract where the terms of a given merger agreement were "consistent with the FHLBB's regulatory policy at the time." Pet. 11. The court simply reaffirmed that "[m]ere approval of the merger does not amount to [an] intent to contract," and that a *Winstar* plaintiff must show "'something more' than mere regulatory approval" or performance of other sovereign or regulatory functions. Pet. App. 14a-15a (citation omitted); see p. 9, *supra*.

Petitioner further contends (Pet. 13) that it would have been "madness" for Charter to have acquired Merit in the absence of a contractual agreement with the government regarding the future treatment of goodwill. Petitioner argues (Pet. 13-14) that the purported irrationality of that course of conduct "is strong evidence that [both petitioner and the government] intended to be

bound by the accounting treatment of goodwill arising in the merger." Those arguments reflect a misconception of the regulatory framework that existed when the merger occurred. As the court of appeals explained (Pet. App. 18a), the regulations in effect at the time of the merger permitted Charter to count goodwill as regulatory capital without securing any forbearances or other approvals from the government. Accordingly, the merged institution would *not* "have been insolvent immediately upon the merger" (Pet. 13), regardless of the existence or lack of existence of a *Winstar* contract.

Nor is there anything inherently irrational about a private actor's entry into a commercial relationship whose prospects for success depend on the maintenance of an existing regulatory scheme. Even without a contractual commitment from the government that applicable statutes and regulations will not change, private parties frequently pursue that course, assuming the risk that the existing legal framework may change. As the court of appeals explained, "[i]n the absence of other evidence indicating the government's intent to contract," the fact that the success of petitioner's venture depended on the continued effectiveness of particular regulatory provisions does not establish that the government made a binding pledge to continue its existing regulatory approach. Pet. App. 19a.

Petitioner suggests (Pet. 15) that "other *Winstar* cases evidence" the government's objective intentions with respect to the merger at issue here. Petitioner's argument appears to be that, because the government included express risk-shifting language in certain agreements that courts later determined created binding contractual obligations on the government, the absence of any clear statement by the FHLBB here that petitioner

would be required to bear such risk of regulatory change is itself evidence of an intent to contract. But that puts the cart before the horse. In order to make its argument work, petitioner must *posit* (Pet. 16-17) that the FHLBB had a binding "agreement with [petitioner]," and thus assume away the central issue in this case.

4. Petitioner also contends (Pet. 8-10, 25, 31-32) that this Court's review is warranted because the Federal Circuit's decisions in *Winstar* cases have undermined this Court's *Winstar* decision and will discourage citizens from entering into commercial contracts with the government. That contention is incorrect.

As the Federal Circuit has correctly observed, *Winstar* claims frequently turn on their particular facts and circumstances, and each case must be considered on its individual merits. See, *e.g.*, *California Fed. Bank, FSB* v. *United States*, 245 F.3d 1342, 1347 (2001), cert. denied, 534 U.S. 1113 (2002). The Federal Circuit's decisions have not "increasingly chipped away at this Court's ruling in *Winstar* for the benefit of the government." Pet. 31. Some *Winstar* plaintiffs have been successful, while others have not. Cumulatively to date, plaintiffs in *Winstar*-related cases have been awarded more than $1 billion, and the awards in individual cases have ranged from $2.05 million to $381 million. See *Hometown Fin., Inc.*, 409 F.3d at 1362; *Glendale Fed. Bank, FSB* v. *United States*, 378 F.3d 1308, 1312 (Fed. Cir. 2004), cert. denied, 544 U.S. 904 (2005).

In other Federal Circuit decisions, relief has been denied based on findings of no contract (as in this case), lack of standing, forfeiture, fraud, or prior material breach. See *Long Island Sav. Bank, FSB* v. *United States*, 503 F.3d 1234, 1251, 1253 (Fed. Cir. 2007), cert. denied, No. 07-1234 (Oct. 6, 2008); *Hughes* v. *United*

States, 498 F.3d 1334, 1339 (Fed. Cir. 2007), cert. denied, 128 S. Ct. 1869 (2008); *Anderson*, 344 F.3d at 1359; *D&N Bank*, 331 F.3d at 1382; *Castle* v. *United States*, 301 F.3d 1328, 1337 (Fed. Cir. 2002), cert. denied, 539 U.S. 925 (2003). Cf. Pet. App. 19 n.9 (stating the court of appeals' conclusion that there was no *Winstar* contract in this case made it unnecessary to reach the government's contention that petitioner lacked standing because any alleged *Winstar* contract was between Charter and the government rather than between petitioner and the government). In the *Winstar*-related cases where it has rejected the plaintiffs' claims, the Federal Circuit has simply respected this Court's admonition that ordinary principles of contract construction and breach should be applied to government contracts. *Winstar*, 518 U.S. at 870-871, 895 (opinion of Souter, J.). Contrary to petitioners' apparent belief, this Court's decision in *Winstar* did not suggest that *all* persons who acquired savings and loans during the 1980s thereby became contractually entitled to receive compensation from the government for any subsequent business losses that could potentially be attributed to changes in the applicable regulatory framework.

In any event, the *Winstar* set of cases is nearing its end. Of the original 122 *Winstar*-related cases, only 15 remain. The issues raised by petitioner will thus have little, if any, future impact.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The Supreme Court of the United States

MOLA DEVELOPMENT CORPORATION,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY MEMORANDUM

The government tries to minimize the importance of this case by casting the dispute as an issue of fact and claiming that any lower court error is of no import because there are only 15 remaining *Winstar* cases. Mola disagrees with these characterizations. Recent events make it abundantly clear that the issues which Mola and other *Winstar* plaintiffs face are still relevant today—even more so than they were only three months ago. One only has to look in a local newspaper on any given day to see that history is repeating itself. Private enterprises are once again bailing out the government insurance fund through the acquisition of failing financial institutions. While the rules of the game may have changed since the 1980s, the government's ability to contract with the acquiring institutions and the institutions' ability to hold the government to the terms of those contracts are very much at issue today. Will today's rescuing institutions suffer the same fate as Mola and the majority of the other *Winstar* plaintiffs?

The Federal Circuit and Court of Federal Claims ruled on the facts of this case in a manner targeted to create rules and standards that depart from this Court's ruling in *United States v. Winstar*, 518 U.S. 839 (1996), and that are inconsistent with other Federal Circuit precedent such as *Fifth Third Bank of Western Ohio v. United States*, 402 F.2d 1221 (Fed. Cir. 2005). These courts cited law from *Winstar*, *Fifth Third Bank* and *Anderson v. United States*, 244 F.3d 1343, 1353 (Fed. Cir. 2003), but they did not adhere to the precedent established by

those cases. Specifically, the Federal Circuit "found" that "Mola points to no evidence of any negotiations about the regulatory treatment of goodwill that could serve as evidence that the government agreed to a goodwill contract." In explaining this conclusion, the Federal Circuit relied on *D & N Bank v. United States*, 331 F.3d 1374, 1378 (Fed. Cir. 2003), for the propositions that regulatory proclamations and an agency's performance of its regulatory or sovereign functions are insufficient to create contractual obligations absent a single integrated document. *D & N Bank,* however, is inapposite because that case truly involved nothing more than a stamp of approval by the regulatory authority. *D & N Bank* did not involve the bargained for exchange regarding the supervisory designation that was present in Mola's case. In extending *D & N Bank* to Mola's situation, the Federal Circuit created a standard whereby nothing that could be construed as a regulatory function could also be construed as a contractual commitment. That standard clearly contravenes the Federal Circuit's prior ruling that the FHLBB could memorialize its contractual commitments in agency documents. *Fifth Third Bank*, 402 F.2d at 1234. Significantly, the FHLBB had no other way of doing business. It also contravenes this Court's instruction in *Winstar*, which described the requisites of a contractual agreement for the regulatory treatment of goodwill:

> [T]he [FHLBB] resolutions, Forbearance Letters, and other documents setting forth the accounting treatment to be accorded supervisory

> goodwill generated by the transactions were not mere statements of then-current regulatory policy, but in each instance were terms in an allocation of risk of regulatory change that was essential to the contract between the parties.

Winstar, 518 U.S. at 909. *Winstar* did not mandate any magic language or the use of a single integrated contract to establish the existence of a *Winstar* contract, and the Federal Circuit and Court of Federal Claims should not be allowed to write such requirements into the body of law governing claims against the government.

In Mola's case, the Federal Circuit also set up a standard by which any agreement for the use of supervisory goodwill that was consistent with Memorandum SP-24 and GAAP, and did not require an extended amortization period beyond that permitted by GAAP, was insufficient to create a contractual commitment. The Federal Circuit drew that same line in *First Federal Lincoln Bank v. United States*, 518 F.3d 1208 (Fed. Cir. 2008). *Winstar* did not set this limitation which is without logic or basis. Decisions upholding the existence of *Winstar* contracts are often based on the fact that the government gave an institution something more than what was allowed by existing regulations, such as extended amortization periods. While an extended amortization period can be one sign of a *Winstar* contract, it is not a prerequisite to a *Winstar* contract. One of the *Winstar* test cases involved an amortization period of not more than 25 years.

Winstar, 518 U.S. at 867. It is clear that there must have been a contract in cases where the parties' agreement exceeded the government's regulatory authority, because it would be the only basis for supporting the agreement, but the Federal Circuit's conclusion that there can be no contract without an extended amortization period does not logically follow from that principle.

Acquiring financial institutions deliberately contracted for the regulatory treatment of goodwill because they knew that regulations could change, and they needed protection from that change. A financial institution's need for a promise regarding the regulatory treatment of goodwill did not differ depending on whether the amortization period was 25 or 40 years. The bargained for treatment of supervisory goodwill should be the same regardless of whether the number of years needed for amortization were consistent with GAAP. Any other interpretation defies this Court's concept that it would have been "madness" for an acquiring institution not to get an upfront promise from the government. *Winstar*, 518 U.S. at 863. While a party cannot rest only on the rationality or the irrationality of a merger, the "madness" concept does reinforce the notion that a contract for the use of supervisory goodwill could be consistent with the government's regulatory authority.

The Federal Circuit and Court of Federal Claims' substantial departures from this Court's previous ruling in *Winstar* and the Federal Circuit's ruling in *Fifth Third Bank* are confirmed by Judge

Newman's dissent in the case below. In her dissenting opinion, she wrote:

> The contract between Mola and the federal government was an integrated combination of various documents involving the government, Mola and its subsidiary Charter, and the insolvent Merit Savings Association. Mola agreed to contribute approximately $2.5 million in cash to the merged Charter/Merit thrift institution, plus an additional $1 million to Merit's shareholders, and the government agreed to classify the merger as 'supervisory'.

App. 24a.

Judge Newman went on to identify the numerous documents that confirm the parties' contract including Mola's H-(e)3 application, the Consolidated Charter & Merit Balance Sheet, FHLBSF memoranda, FHLBSF correspondence, and the FHLBB certificate deeming Merit a supervisory case. App. 25a-27a. All of these documents pertain to Mola's quid pro quo bargain for the supervisory designation. The supervisory designation achieved the regulatory treatment of goodwill which Mola sought. Judge Newman also explained that the parties had engaged in multiple rounds of negotiation and that supervisory goodwill was an essential component of those negotiations. Under *Winstar*, FHLBB resolutions, forbearance letters and other regulatory documents setting forth the

regulatory treatment of goodwill were enough to support the existence of a contract for supervisory goodwill. *Winstar*, 518 U.S. at 909. Further, in some cases, evidence of the contract could come from discussions and surrounding circumstances. *Fifth Third Bank*, 402 F.3d at 1235. Mola's case is no different.

Based on Judge Newman's findings, it is clear that there was at least *some evidence* of a contract for supervisory goodwill between the parties. The majority panel could have only determined that there was *no evidence* by implying standards and criteria for contract formation in *Winstar* cases that were not previously there. In this instance, those standards were a prohibition against contracts that were consistent with the then existing regulatory framework and a need for a single, integrated document or "magic language" that explicitly spelled out the terms of the contract. Had Mola used the words "supervisory goodwill" instead of "supervisory merger", the Federal Circuit may have come to a different conclusion. The semantic distinction is unwarranted when Mola needed the supervisory designation in order to use supervisory goodwill for the purpose of meeting regulatory capital requirements.

Finally, contrary to the government's assertion, Mola does not argue that every merger that the government approved in the early 1980s resulted in a contract with the government. Where there is no quid pro quo or bargained for exchange with the government, there is no contract. *See e.g.*, *D & N Bank*, 331 F.3d at 1378. The supervisory

designation in and of itself is insufficient to establish the existence of a contract for supervisory goodwill. But, where a party bargains for that designation in a context where the acquiring institution needs to count supervisory goodwill towards its capital requirement, and the parties come to an agreement consistent with ordinary principles of contract law, it cannot be said that there is no contract for supervisory goodwill as a matter of law.

The Federal Circuit changed the landscape in which *Winstar* cases are decided through its rulings on the issues in the case below. It is not enough that the Federal Circuit cited the right law if it applied the facts of the case in a manner designed to defeat that law. Given the repeat-game nature of the *Winstar* cases, and the lower courts' increasing departures from the *Winstar* mold, it is important that the Court hear this case. Otherwise, the Federal Circuit can make new law and depart from the standards this Court set forth in *Winstar*, without any check or balance, simply because the government declares the decision to be an issue of fact.

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